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R E F L E T S

Brief information on legal developments of Community interest

Contents

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A. Case law

I. European and international courts

European Court of Human Rights

European Convention on Human Rights – Prohibition of inhuman or degrading treatment – Right to an effective remedy – Transfer, by the Belgian authorities, of an asylum seeker to Greece based on the Dublin II Regulation – Deficiencies in the asylum procedure – Violation of Articles 3 and 13 of the Convention by Belgium and Greece

On 21 January 2011, the ECHR, sitting as a Grand Chamber, passed judgment in the case of M.S.S. v. Belgium and Greece, which concerned the Belgian authorities' transfer of an asylum seeker to Greece on the basis of Council Regulation No. 343/2003 on determining the Member State responsible for examining an asylum application (hereafter referred to as "the Dublin II Regulation"). The ECHR found that Belgium and Greece had violated Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) read in conjunction with Article 3 of the Convention.

The appellant, an Afghan national, entered EU territory through Greece in 2008. In 2009, he arrived in Belgium, where he filed an asylum application. Since the Belgian Aliens Office held that Greece had to examine his claim for asylum, under the Dublin II Regulation, it decided to refuse him residence and issue him with an order to leave the country. His appeals against this decision were rejected and he was transferred to Greece in June 2009.When he arrived in Athens, he was placed in detention in a facility next to the airport. He was released three days later and given an asylum seeker's card. He lived on the street from the day of his release. In August 2009, after trying to leave Greece with a false identity card, the appellant was arrested and once more placed in detention in the facility next to the airport. He was held there for one week. After he was released, he continued to live on the street.

The appellant held that his detention and living conditions in Greece and his transfer to Greece by Belgium constituted inhuman or degrading treatment within the meaning of Article 3 of the Convention. He also complained of the lack of an effective remedy (Article 13 of the Convention) in Belgian and Greek law that would allow him to have his complaints examined.

The ECHR observed that the States which form the external borders of the European Union experience considerable difficulties in coping with the increasing influx of migrants and asylum seekers. However, given the absolute character of Article 3, this could not absolve Greece of its obligations under that provision.

The ECHR found that the appellant's living conditions in the detention centre, and particularly the poor hygiene and sanitary conditions and overcrowding, were inacceptable and could be considered degrading treatment breaching Article 3 of the Convention.

With regard to the appellant's living conditions in Greece after his release, the ECHR reiterated that Article 3 of the Convention could not be interpreted as obliging Member States to provide all refugees with financial assistance to enable them to maintain a certain standard of living. Nonetheless, the ECHR believed that the Greek authorities had not had due regard of the appellant's vulnerability as an asylum seeker and should be held responsible, because of their inaction, for the situation in which he had found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. Through the fault of the authorities, the appellant found himself in a situation incompatible with Article 3 of the Convention.

Furthermore, the ECHR found that there had been a violation of Article 13 of the Convention read in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the appellant's asylum request and the risk he faced of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

As for Belgium, the ECHR found that transferring the appellant to Greece constituted a violation of Article 3 given that it exposed the appellant to risks connected to deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece that breached Article 3 of the Convention.

Although Belgium acted on the basis of a European Union regulation, it nevertheless remained responsible under the Convention. By virtue of Article 3(2) of the Dublin II Regulation, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down by the regulation. This means that the Belgian authorities did not have to transfer the appellant. Referring to its approach in its judgment in the case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland (30 June 2005, no. 45036/98), the ECHR found that the contested measure did not strictly fall within Belgium's international legal obligations and that Belgium was thus fully responsible.

The ECHR believed that the Belgian authorities must have known about deficiencies in the asylum procedure in Greece. In that situation, they should not have merely assumed that the appellant would be treated in conformity with the Convention standards.

Moreover, the lack of an effective remedy against the appellant's expulsion order meant that Belgium violated Article 13 read in conjunction with Article 3 of the Convention. Since examination by the Aliens Appeals Board under the "extremely urgent" procedure was essentially limited to checking whether the parties concerned had produced tangible evidence of the irreparable damage that could result from the alleged potential violation of Article 3 of the Convention, the appellant had no chance of a favourable outcome.

It should be noted that there are several pending references for preliminary rulings relating to the issue of knowing to what extent an EU Member State can be held responsible for examining an asylum application on the basis of Article 3(2) of the Dublin II Regulation if there was a risk that the asylum seeker's fundamental rights would be violated by the State responsible for the application by virtue of the criteria set by the Dublin II Regulation (C-4/11, Puid, joined cases C-411/10, N.S., C-493/10, M. E. and others).

Furthermore, the Bundesverfassungsgericht (German Federal Constitutional Court) issued

several interim orders temporarily prohibiting the transfer of asylum seekers to Greece in 2010. The German Minister for the Interior has since issued the competent authority with an instruction, valid until 12 January 2012, telling it not to transfer asylum seekers to Greece and to examine their asylum applications in Germany (see Bundesverfassungsgericht order of 25 January 2011, 2 BvR 2015/09, www.bundesverfassungsgericht.de).

European Court of Human Rights, judgment of 21 January 2011, M.S.S. v. Belgium and Greece (appeal no. 30696/09), www.echr.coe.int/echr

IA/32842-A

[TLA]

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European Convention on Human Rights – Right to marry – Prohibition of discrimination – Freedom of religion – Need for immigrants wishing to marry outside of the Church of England to obtain approval – Violation of Articles 12 and Article 14 read in conjunction with Articles 9 and 12 of the Convention

On 14 December 2010, the ECHR handed down a judgment in the case of O'Donoghue and others versus the United Kingdom. It concluded unanimously that there had been a violation Articles 12 and 14 of the Convention read in conjunction with Articles 9 and 12.

The appellants are a Nigerian national, Mr Iwu, and three dual British and Irish nationals, Ms O'Donoghue (Mr Iwu's wife), their son and Ms O'Donoghue's son from a previous relationship. They live in Londonderry in Northern Ireland and are practising Roman Catholics. Mr Iwu arrived in Northern Ireland in 2004 and claimed asylum in 2006. In November 2009, he was granted discretionary leave to remain, which was valid until November 2011. He is not entitled to work. Mr Iwu met Ms O'Donoghue in November 2004. In 2006, he proposed to Ms O'Donoghue and she accepted.

A scheme established in the UK in 2005 meant that to be able to marry, Mr Iwu, as a person subject to immigration control, had to obtain either entry clearance expressly granted for this purpose, or a certificate of approval. To obtain this certificate, he had to submit an application to the Minister for Home Affairs and pay an application fee of £295. Only foreign nationals with sufficient leave to enter or remain in the country could be granted such a certificate. This scheme did not apply to couples wanting a religious wedding in the Church of England. Following the amendment of the law in 2006, persons without leave to enter or remain for a sufficient period could be asked to provide additional information as proof that the proposed marriage was genuine. The 2007 amendment extended the possibility of obtaining a certificate of approval to persons waiting for the outcome of their residence permit application.

In 2007, Mr Iwu applied for a certificate of approval and asked to be exempted from paying the fee. His application was rejected. The couple obtained the certificate of approval in 2008 after friends helped them to pay the application fee. With regard to Article 12 of the Convention, the ECHR noted that a State party would not necessarily be violating of Article 12 by subjecting potential marriages between foreign nationals to reasonable conditions, the aim being to ascertain that a prospective union was not a marriage of convenience. However, the decision to issue or refuse a certificate of approval was not based exclusively on the genuineness of future spouses' marriage. The first and second versions of the scheme systematically prohibited all persons belonging to a specified category from exercising the right to marry, regardless of whether the planned marriage was a marriage of convenience or not. Lastly, the ECHR found that charging such high application fees that needy applicants may not be able to pay them could impair the very essence of the right to marry.

With regard to Article 12 read in conjunction with Article 14 of the Convention, the ECHR ruled that the first version of the scheme discriminated on the grounds of religion. Persons without leave to remain, who would be willing to marry in the Church of England, would be able to do so freely. Mr Iwu was in a similar situation but was unwilling (on account of his religious beliefs) and unable to enter into a marriage of this kind, since he was living in Northern Ireland. As a consequence, Mr Iwu was treated differently to a person who would be willing and able to marry in the Church of

England. The government did not provide adequate or objective justification for this difference in treatment.

With regard to religious discrimination, the government conceded that there had been a violation of Mr Iwu's rights as safeguarded in the Convention.

The ECHR therefore ruled unanimously that Articles 12 and 14 read in conjunction with Articles 9 and 12 of the Convention had been violated and awarded the appellant €8,500 in respect of non-pecuniary damage and £295 in respect of pecuniary damage.

European Court of Human Rights, judgment of 14 December 2010, O'Donoghue and others v. the United Kingdom, www.echr.coe.int/echr

IA/32651-A

[MAOS]

European Convention on Human Rights – Freedom of expression – Right to an effective remedy – Scottish legal procedures preventing the media from challenging a Scottish court order forbidding the publication of information concerning criminal proceedings – Violation of Article 10 read in conjunction with Article 13 of the Convention

On 7 December 2010, the European Court of Human Rights (hereafter referred to as "the ECHR") (Fourth Section) delivered its judgment in the case of Mackay and BBC Scotland v. the United Kingdom, unanimously ruling that the High Court of Justiciary order forbidding the publication of information relating to legal proceedings constitutes a violation of Article 10 read in conjunction with Article 13 of the Convention.

The appellants were a retired British journalist and the British Broadcasting Corporation in Scotland (hereafter referred to as "BBC Scotland"). They challenged an order from the High Court of Justiciary forbidding the publication of information concerning legal proceedings. In the proceedings in question, the judge had realised that police officers and prosecutors may have overheard confidential conversations between the accused and their representatives and, as a result, he decided to stay proceedings. Consequently, the accused could not face new charges.

On 28 September 2004, the judge issued an interim order forbidding the publication of any information relating to the proceedings. Following a hearing involving BBC Scotland, this order was modified the next day to allow information to be published after the conclusion of any appeal or new trial. On 15 February 2005, when hearing the Crown's appeal against the judge's decision to stay the proceedings, the High Court of Justiciary issued an order forbidding the publication of information on any appeal hearings until the end of the proceedings. No requests were made to repeal or modify this order, so it became final on 17 February 2005.

BBC Scotland had sent a fax to the court on the afternoon of 15 February 2005 asking for a hearing about the order. The Court responded that a hearing could not be held before 18 February 2005. According to the Crown, the order became final on 17 February 2005 since no appeal had been lodged against it. However, the appellants argued that their fax dated 15 February 2005 constituted an appeal against the order and that, as a result, the order never became final.

The ECHR confirmed that the key issue was to determine whether the appellants had been deprived of an effective remedy by which they could have challenged the order. The ECHR noted that, unlike in England and Wales, where there are legislative measures allowing any person or interested party to challenge judiciary orders forbidding the publication of information on legal proceedings, this option did not exist in Scotland. In practice, the media could take part in hearings to challenge such orders, but this option always depended on the will of the court involved

In the case in point, the appellants' request to recall the order was not put forward before July 2005, five months after the end of the proceedings, and interest in the proceedings had died down considerably. As a result, the appellants could not have effectively challenged the legal order in question. The ECHR found that there had been a violation of Article 13

read in conjunction with Article 10 of the Convention.

It should be noted that, in the case in point, the appellants could have made use of *nobile officium*, a procedure used in Scottish law. However, owing to their genuine conviction that their fax had prevented the order from becoming final, the appellants believed that recourse to *nobile officiu*m was not available to them in good time. Consequently, although recourse to *nobile officium* had proven effective in other cases, it did not completely fulfil the requirements of Article 13 of the Convention in the case in point.

European Court of Human Rights, judgment of 7 December 2010, Mackay and BBC Scotland v the United Kingdom, www.echr.coe.int/echr

IA/32666-A

[OKM] [SMITHSA]

EFTA Court

European Economic Area (EEA) – Directive 2004/25/EC of the European Parliament and of the Council on takeover bids – Acquisition of control – Mandatory bid – Modification of bid – Clearly determined situations and criteria – Reference to the market price

The EFTA Court was asked to make a preliminary ruling on a question regarding the interpretation of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council on takeover bids (hereafter referred to as "the directive"). The question related to setting prices for takeover bids as part of a mandatory bid. The EFTA Court found that:

"The second subparagraph of Article 5(4) of Directive (…) precludes national legislation which provides that the price to be offered in a mandatory bid must be adjusted to be at least as high as the "market price" in situations where it is clear that the "market price" is higher than the price calculated according to the main rule prescribed in accordance with the first subparagraph of Article 5(4), without further clarification of the term "market price". In particular, further clarification is needed of the time interval relevant for determining the "market price", whether or not the "market price" must be calculated on the basis of a volume-weighted average, and whether actual trades are necessary or standing buy or sell orders suffice in order to establish a "market price"."

In this regard, it noted that:

"(..) the second subparagraph of Article 5(4) provides the EEA States with a certain discretion to define circumstances in which exceptions from the main rule (the "highest price paid rule") laid down in the first subparagraph of Article 5(4) of the Directive apply. The provision also lists examples of possible exceptions which address, first, circumstances where the bid price established according to the main rule might, as a result of particular circumstances, not be equitable, for example, because the market has been manipulated, and, second, situations where other legitimate interests might be at stake, such as the need to enable a firm in difficulty to be rescued. Indeed, if an EEA State is to have the possibility to deal in a flexible way with new circumstances as they arise, it cannot be required to describe in detail each specific situation in advance.

Nevertheless, the Directive aims at achieving a high level of predictability for investors (…). Consequently, for the circumstances and criteria referred to in the second subparagraph of Article 5(4) to be "clearly determined", they must be formulated in a manner which renders the national rule easily applicable in the most typical cases falling within the rule." (points 47-48)

"Accordingly, (…) a reference [in the national legislation] to "the market price at the time when the obligation to make a bid arises" cannot be considered to constitute circumstances and criteria which are clearly determined, as required by the second subparagraph of Article 5(4) of the Directive. Such a rule does not enable a prudent investor to be informed about the extent of his rights and obligations in such a way as to allow an adjustment of the equitable price established according to the main rule under the first

subparagraph of Article 5(4)." (point 50)

EFTA Court, judgment of 10 December 2010, E-1/10, Periscopus AS v. Oslo Børs ASA and Erik Must AS, www.eftacourt.int

IA/32641-A

[LSA]

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European Economic Area (EEA) – Social policy – Safety and health at work – Council Directives 89/391/EEC and 92/57/EEC – Article 3 of the EEA Agreement – Liability in the event of accidents at work – Worker negligence – Compensation refused – Liability of the State

The EFTA Court was asked to provide rulings on two questions. The first related to the interpretation of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work and Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites with regard to a national regulation stipulating that a worker involved in an accident at work cannot claim for damages from the employer if the worker's own negligence led to the worker being held liable for the harm suffered, even if it is demonstrated that the employer has failed to fulfil its obligation to respect rules regarding workplace safety and working conditions on its own initiative. The other question concerned the conditions for liability of a State that did not correctly transpose these directives into national law.

With regard to the first question, the EFTA Court ruled that:

"Save in exceptional circumstances it is not compatible with Directive 89/391 (…) and Directive 92/57 (…) interpreted in light of Article 3 EEA to hold a worker liable under national tort law for all, or the greater share, of the losses suffered as a result of an accident at work due to his own contributory negligence when it has been established that the employer had not on his own initiative complied with rules regarding safety and conditions in the work place. Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer."

It noted in this connection that:

"In order to be effective, proportionate and dissuasive, sanctions for breach of the duties established by Directives 89/391 and 92/57 must reflect the principle that the employer bears the main responsibility for the safety and health of workers. This does not exclude the possibility of attributing responsibility for an accident to an employee who has contributed to the accident through his own negligence.

However, save in exceptional circumstances it would be contrary to the principle that the main responsibility lies with the employer to attribute all, or the greater share, of the losses suffered as a result of an accident at work to the employee due to his own contributory negligence when it has been established that the employer, in disregard of his duties according to the Directives, had not on his own initiative complied with rules regarding safety and conditions in the work place. Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer." (points 57-58)

The EFTA Court then ruled on the conditions for State liability, finding that:

"An EEA State may be held liable for breach of the rule on contributory negligence inherent in Directives 89/391 (…) and 92/57 (…) interpreted in light of Article 3 EEA provided that the breach is sufficiently serious. It is for the national court to decide in accordance with the settled case law on State liability for breaches of EEA law whether this condition is fulfilled in the case before it."

It further observed that:

"(…) the issue of State liability for losses resulting from incorrect application of EEA law by national courts falls outside the scope of this question. (…) however (…) if States are to incur liability under EEA law for such an infringement (…), the infringement would in any case have to be manifest in character (…)." (point 77)

EFTA Court, judgment of 10 December 2010, E-2/10, Þór Kolbeinsson v. the Icelandic State, www.eftacourt.int

IA/32655-A

[LSA]

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European Economic Area (EEA) – Judicial procedures – Requirement for non-residents to provide security for legal costs – Indirect discrimination within the meaning of Article 4 of the EEA Agreement – Justification – Condition

The EFTA Court was asked to rule on two questions about the interpretation of Article 4 of the EEA Agreement in connection with a requirement for appellants residing another EEA Member State to provide security for legal costs while appellants residing in that Member State did not have to provide such security. It found that:

"A provision of national law pursuant to which non-resident plaintiffs in civil litigation must provide security for costs of court proceedings, while resident plaintiffs are not obliged to provide such security, entails indirect discrimination within the meaning of Article 4 EEA.

In order for such a discrimination to be justified on the basis of public interest objectives, the provision of national law must be necessary and not excessive in attaining them.

The latter condition is not met in cases where the State in which the plaintiff is resident allows for the enforcement of a costs award, whether on the basis of treaty obligations or unilaterally.

In other cases, too, provision of security may not be required in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings. This means in particular that security may not be required for an amount which is out of proportion to the costs likely to be incurred by the defendant or unreasonably high or which must be posted within a very short period of time. The form of security required, the situation giving rise to its imposition and whether or not the plaintiff is entitled to legal aid also constitute important factors.

It is for the national court to determine in a particular case whether the conditions for justification are satisfied."

In this connection, the EFTA Court observed that:

"Encouragement of cross-border activity is a fundamental objective of the EEA Agreement. When such an activity gives rise to civil litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State.

If such enforcement is possible at all, this may well be more cumbersome than enforcement in the jurisdiction in which the judgment is delivered. Consequently, a rule of national law obliging a plaintiff to provide security for costs in such cases protects the interests of defendants by placing them in a position comparable to defendants sued by a plaintiff resident within the same jurisdiction. In principle, such protection may constitute a public interest objective." (points 41-42)

"In assessing the necessity of a national provision requiring a non-resident plaintiff to provide security for costs, the applicable rules on recognition and enforcement of foreign judgments in civil matters in the state in which the plaintiff resides must be taken into account." (point 44)

"Where the State in which the plaintiff is resident allows for the enforcement of a (…) [concerned State] costs award, whether on the basis of treaty obligations or unilaterally, it would be excessively discriminatory to require the plaintiff to provide security for costs. In

these circumstances, the restrictions on a plaintiff's possibility to defend his rights that result from a requirement to provide security for costs cannot be justified by reference to the additional burden of enforcement abroad.

However, in cases in which the law of the State in which the plaintiff is resident does not provide for the enforcement of a costs award, the national court has to assess whether the problems confronting successful defendants resident in (…) [the concerned State] in the recovery of their costs are sufficient to outweigh the interests of plaintiffs from other EEA States in being able to commence legal proceedings in (…) [the concerned State].

In this assessment, various factors must be taken into consideration. For example, it is relevant whether or not non-resident plaintiffs unable to bear the costs of litigation are entitled to legal aid and, if so, under what conditions. Furthermore, factors such as the nature of the security, its amount, the time-limit for its posting and the situation giving rise to its imposition may have to be taken into account. Requiring security for an amount which is out of proportion to the costs likely to be incurred by the defendant or unreasonably high or which must be posted within a very short period of time would constitute a disproportionate impediment.

If it is considered desirable that the imposition of security for costs should not depend on such case-by-case assessment, accession to a multinational instrument such as the 2007 Lugano Convention would constitute a possible remedy (…)." (points 48-51)

EFTA Court, judgment of 17 December 2010, E-5/10, Dr Joachim Kottke v. Präsidial Anstalt and Sweetyle Stiftung, www.eftacourt.int

IA/32654-A

[LSA]

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for the former Yugoslavia – International armed conflict in Croatia – Krajina region – War crimes – Crimes against humanity – Violations of the laws or customs of war

On 15 April 2011, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia found two Croatian generals, Ante Gotovina and Mladen Markač, guilty of crimes against humanity and violations of the laws or customs of war that were perpetrated by Croatian forces during Operation Storm, a military campaign that ran from July to September 1995.

Trial Chamber I found that the crimes had been committed during an international armed conflict in Croatia, in the context of many years of tension between Serbs and Croats in the Krajina region, where a considerable number of crimes had already been committed against Croats. However, judge Alphonsus Orie, who was chairing Trial Chamber I, stated that the case in point was about determining whether Serb civilians in the Krajina region were the targets of crimes and whether the accused should be held liable for these crimes.

Gotovina, who was a Lieutenant General of the Croatian army and the commander of the Split military district in the period covered by the accusation, and Markač, who was Assistant Minister for the Interior in charge of Special Police matters, were both found guilty of persecution, deportation, plunder, wanton destruction, murder, assassination, inhumane acts and cruel treatment. They were sentenced to 24 years and 18 years of imprisonment respectively.

The judgment triggered protests in Croatia, where most Croatians view the two accused as heroes for their role in securing Croatia's independence. The media reported that public support for Croatia joining the European Union waned following the decision.

Criminal Tribunal for the former Yugoslavia, case of 15 April 2011, Gotovina et al., no. IT-06-90-T, www.icty.org

IA/32662-A

[SEN]

II. National courts

Germany

Copyright and related rights- Directive 2001/29/EC of the European Parliament and of the Council – Harmonising certain copyright and related rights in the information society – Protection of technological measures – Prohibition on advertising for products designed to allow protection to be circumvented – Interface with press freedom and freedom of expression

The Bundesgerichtshof (German Federal Court of Justice) strengthened the press freedom and freedom of expression of online information agencies. The Bundesgerichtshof found that copyright had not been violated in a case between music industry companies and a publisher providing information on the launch of new software allowing the removal of DVD copy protection.

In the case in point, the publisher, which runs a news information website ("heise online"), had mentioned in an article that new software had been launched allowing removal of DVD copy protection. The article also provided several electronic references ("links") to external websites, including that of the company that developed and sold the software in question. The music industry companies that applied for an injunction against this behaviour argued that the article, with the electronic references it included, was a means of advertising the software and contributed to its distribution. This is prohibited under Article 95a(3) of the German Copyright Act (Urheberrechtsgesetz).

The Bundesgerichtshof found that when an article is published online and contains links to third-party websites, these links are also covered by press freedom and freedom of expression. In the court's view, Article 95a(3) of the Urheberrechtsgesetz, which transposes Article 6(2) of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain copyright and related rights in the information society, should be interpreted in light of press freedom and freedom of expression as guaranteed by Article 11 of the EU Charter of Fundamental Rights and Article 5 of the German Basic Law (Grundgesetz).

In this respect, the Bundesgerichtshof highlighted that press freedom and freedom of expression focus on both form and substance, meaning that publishers can add links in their articles to support their claims or provide more information.

Furthermore, the Bundesgerichtshof stressed that freedom of expression also applies to information which can offend, shock or trouble recipients, as already highlighted by the European Court of Human Rights and the case law of the European Court of Justice in its judgment of 6 March 2001 (C-274/99 P, Connolly v. Commission, ECR p. I-1611, point 39). In this connection, it should be taken into account that the possibility of receiving information is of considerable public interest and also allows information on flagrantly illegal behaviour or claims to be disclosed.

In the case in point, the contested article did not further violate music industry companies' copyright rights linked to the software which allows DVD protection to be removed. In any case, readers could have used search engines to find the website of the company that produces and sells the software. Besides, the publisher's article made it clear that such behaviour was illegal.

Bundesgerichtshof, judgment of
14 October 2010, AnyDVD, I ZR 191/08,
www.bundesgerichtshof.de

IA/33206-A

[AGT]

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Visas, asylum, immigration – Asylum policy –Minimum standards concerning conditions for the allocation of refugee or subsidiary protection status – Council Directive 2004/83/EC – Conditions regarding eligibility for subsidiary protection – Concept of internal

armed conflict – Serious and personal threats to a civilian's life or person – Requirement of proof

The Bundesverwaltungsgericht (German Federal Administrative Court) has handed down an additional ruling on the interpretation of national regulations transposing Council Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise require international protection and the content of the protection granted (see also *Reflets no. 3/2008,* p. 12 and *no. 2/2009*, p. 6 [both only available in French]). The 27 April 2010 judgment explained the Bundesverwaltungsgericht's case law on the applicable conditions for eligibility for subsidiary protection and followed the reasoning of the ECJ judgment in the Elgafaji case (17 February 2009, C-465/07, ECR p. I-921).

In accordance with Article 15(c) of Council Directive 2004/83/EC, the German Residence Act (Aufenthaltsgesetz) provides subsidiary protection in the event of a significant and personal threat to a civilian's life or person in the context of internal or international armed conflict. Although the concept of "indiscriminate violence", mentioned in Article 15(c) of Council Directive 2004/83/EC, has not been incorporated into the wording of the German legal provision, the Bundesverwaltungsgericht stated that it was implicit.

In the case in point, the Bundesverwaltungsgericht was asked to rule in the last instance on the claim of an Afghan national of Pashtun ethnicity who was applying for protection from repression, fearing punishment from the Taliban for resisting forced recruitment. The issue here was knowing how to interpret the concept of "internal armed conflict". Firstly, the Bundesverwaltungsgericht pointed out that the 1949 Geneva Conventions and Additional Protocol II of 1977 had to be taken into consideration in the interpretation of the concept of "internal armed conflict". Secondly, it specified that although Article 15(c) of Council Directive 2004/83/EC had to be interpreted in the light of international humanitarian law, it was not an accurate reflection of the concepts used in the Geneva Conventions. Within the framework of Council Directive 2004/83/EC, relaxed criteria should be applied to ensure that subsidiary protection always remains the objective. More specifically, the concept of "internal armed conflict" does not require the parties involved in the conflict to exhibit "a specific degree of organisation". It is enough for the parties involved in the conflict to be able to carry out coordinated and sustained attacks which perceptibly affect the civilian population.

However, when it comes to "serious and personal threats against a civilian's life or person", the Bundesverwaltungsgericht emphasised that there should be sufficient evidence of such an attack. In this respect, the lower court had applied Article 4(4) of Council Directive 2004/83/EC, which provides for a facilitated standard of proof if the appellant has already suffered persecution, has previously been the target of serious attacks or has already received direct threats. Such persecution or attack is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm. .However, according to the Bundesverwaltungsgericht, this provision should be interpreted to the effect that it requires a close connection ("innerer Zusammenhang") between the attack which the appellant has already suffered and the genuine risk of being the subject of serious attacks again. A close connection such as this can arise when the initial situation has not changed and when there is a risk of the appellant being subject to renewed serious attacks for the same reasons. In the case in point, the Bundesverwaltungsgericht believed that there was not enough proof that the appellant had been subject to an attack.

As regards the concept of "indiscriminate" violence resulting from serious and personal threats, the Bundesverwaltungsgericht referred to the aforementioned ECJ judgment in the Elgafaji case, which found that this term suggests that it can be extended to people regardless of their personal situation.

The case was returned to the lower court, which will rule on its substance.

Bundesverwaltungsgericht, judgment of 27 April 2010, 10 C 4/09, www.bverwg.de

IA/33207-A

[AGT]

Belgium

International agreements – Agreement concluded by the European Union with a third country – Agreement on the processing and transfer of passenger name record (PNR) data – National regulations ratifying the Agreement – Action for annulment – Inadmissibility

In its judgment of 24 March 2011, the Belgian Cour constitutionnelle dismissed an action for annulment against the law of 30 November 2009 ratifying the Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (hereafter referred to as "the 2007 PNR Agreement"). This agreement was concluded on 23 July 2007 in Brussels and on 26 July 2007 in Washington.

The appellant presented two arguments in support of the action, one of which was that Article 2 of the above law violated Article 22 of the Belgian constitution, read in conjunction with Articles 8 and 13 of the European Convention on Human Rights. The appellant maintained that the measures sanctioned by the contested provision – gathering and processing all passengers' personal data – had no legitimate purpose and were unnecessary in a democracy and that there was no effective remedy against them.

The Cour constitutionnelle found that the action was inadmissible insofar as the procedure for concluding the 2007 PNR Agreement, which was initially launched on the basis of Article 24(5) of the Treaty on European Union (according to which no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure), had been amended due to the entry into force of the Treaty of Lisbon. The procedure for concluding this Agreement is now governed by Article 218 of the Treaty on the Functioning of the European Union, which provides for approval from the European Parliament.

Furthermore, the Cour constitutionnelle specified in its judgment that the contested law had not been part of the procedure for concluding the PNR Agreement between the European Union and the United States since the Treaty of Lisbon entered into force. Consequently, the Cour constitutionnelle ruled that the appellant had no interest in applying for the annulment of a law which in no way affected the Agreement's conclusion.

Cour constitutionnelle/ Grondwettelijk Hof, judgment of 24 March 2011, 42/2011, www.const-court.be

IA/33125-A

[NICOLLO]

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Approximation of laws – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2004/18/EC of the European Parliament and of the Council – Exclusion from participation in a contract – Decree prohibiting any award of an auditor's mandate within public bodies to certain persons – Exclusion designed to ensure observance of the principles of equal treatment and transparency

In its judgment handed down on 27 January 2011, the Belgian Cour constitutionnelle/ Grondwettelijk Hof, referring to the 16 December 2008 judgment by the European Court of Justice (Michaniki, C-213/07, ECR p. I-9999), ruled that the Walloon Region Decree of 30 April 2009 concerning supervisory tasks carried out by auditors within public interest bodies, intermunicipal companies and public housing companies […] (hereafter referred to as "the contested decree") did not contravene Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereafter referred to as "the directive").

The contested decree prohibits any award of an

auditor's mandate to members of the legislative or executive bodies listed in the decree as well as to members of a network which includes a legal person or an entity in which a member of the aforementioned legislative or executive bodies holds a direct or indirect proprietary interest. According to the Cour constitutionnelle/ Grondwettelijk Hof, such "automatic" exclusion from the public contracts in question does not violate Article 45 of the directive since the reasons for exclusion from participation in a public contract, as exhaustively listed in that article, relate solely to the tenderer's professional abilities.

Having noted that, in accordance with the Michaniki judgment, Member States have the option to adopt or maintain rules designed to ensure observance of the principles of equal treatment and transparency in relation to public contracts, the Cour constitutionnelle/ Grondwettelijk Hof held that the contested decree did not concern conduct relating to the tenderer's professional integrity but rather dealt with situations which the legislator judged could be in contradiction with the principles of equal treatment and transparency due to the risk of conflict of interest which may arise in the case of certain auditors.

Cour constitutionnelle/ Grondwettelijk Hof, judgment of 27 January 2011, no. 9/2011, www.const-court.be

IA/33128-A

[MEURENA]

Bulgaria

Free movement of persons – Restriction – Ban on leaving the country – Recovery of public-law debt – Conformity of a national rule with EU law and the Bulgarian constitution

Two successive decisions by the Bulgarian supreme courts – both administrative and constitutional – shed further light on examining the conformity of national law with EU law and assessing the constitutionality of a legislative provision.

The Varhoven administrativen sad (Supreme Administrative Court) was asked to rule on whether an order imposing a coercive administrative measure, by virtue of Article 75(6) of the law on Bulgarian personal documents (hereafter referred to as "the LBPD") could be annulled if it contradicted Directive 2004/38/EC of the European Parliament and of the Council.

It should be noted that under the aforementioned article of the LBPD, the tax authorities can ask for an administrative measure in the form of a ban on leaving the country to be imposed on any debtor with a public-law debt described in national law as "considerable", meaning more than 5,000 leva. This administrative measure is applied until the debt is recovered or secured.

In its interpretative judgment of 22 March 2011, the Varhoven administrativen sad ruled that a Ministry of the Interior order imposing an administrative measure in the form of a ban on leaving the country by virtue of Article 75(6) of the LBPD should be annulled if it contradicted Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

The judges' arguments supporting this interpretative judgment were based on:

- consideration of the fundamental principle of the primacy of EU law over any national law that contradicts it;
- the fact that Article 75(6) of the LBPD creates a restriction on the right of Bulgarian citizens (as citizens of the Union) to move freely within the territory of the Member States;
- the issue that such a restriction could be justified on grounds of the protection of public policy, public security or public health, as provided for in Article 27(1) of the directive. These grounds may not be invoked to serve economic ends;
- the existence of guarantees, as provided for by the European legislator for imposing a restriction of this type, such as the ban on invoking the admissible grounds for economic ends, the fact that measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned, whose conduct must

represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.

Consequently, the wording of the judgment in question provided that when national law (Article 75(6) of the LBPD in the case in point) is found to contradict Directive 2004/38/EC of the European Parliament and of the Council, the administrative court must, in the framework of its jurisdiction, apply Union law in full and, in so doing, defend the rights that Union law confers upon individuals. This applies to national laws adopted both before and after the adoption of the Community legal provision. National courts do not have to wait for the non-compliant national to be annulled through legislative or constitutional means.

The aforementioned decision by the Varhoven administrativen sad put an end to a series of especially important cases and discussions linked to imposing a coercive administrative measure by virtue of Article 75(6) of the LBPD, thus limiting one of the fundamental freedoms, namely, free movement of persons. However, the decision has not definitively resolved the problems faced by debtors who are not entitled to leave the country. The decision was attributed *ex nunc* effect, meaning that it applies to the annulment of future coercive measures taken by the national authorities and only benefits debtors who had lodged an appeal against the measures before an administrative court.

It should also be noted that 19 of the Varhoven administrativen sad's judges included a reasoned opinion along with their signatures. This reasoned opinion states that the Varhoven administrativen sad does not have jurisdiction to rule on this matter, since the court would have to determine the exact content of the provisions of primary law derived from the Union (especially the Treaty on the Functioning of the European Union and Directive 2004/38/EC of the European Parliament and of the Council) beforehand.

In judgment no. 2 of 31 March 2011, the Konstitutsionen sad, which had been asked to rule by the Bulgarian ombudsman, gave its verdict on the constitutionality of Articles 75(5) and 75(6) of the LBPD. It found that despite the fact that they aimed to recover considerable public-law debts for the State, these provisions breached the Bulgarian constitution given that they did not comply with the principle of proportionality.

In the reasoning for the judgment, the Konstitutsionen sad highlighted that the recovery of private and public-law debts must above all be guaranteed by a swift and effective judicial procedure for enforcing judgments and that this should be based not on the personality of the debtor but impounding the debtor's property and obtaining repayment of the debt. The court also pointed out that Article 35(1) of the Bulgarian constitution gives every Bulgarian citizen the right to move within and leave Bulgarian territory. This right may only be restricted by a law to protect national security, public health and the rights and freedoms of other citizens. Consequently, the coercive administrative measure contained within Articles 75(5) and 75(6) of the LBPD, which automatically prevented a citizen from freely leaving Bulgaria, constituted an inappropriate judicial method of recovering debts.

In conclusion, the fact that the court declared Articles 75(5) and 75(6) to be unconstitutional will contribute to more faithful and complete application of Article 27 of Directive 2004/38/EC of the European Parliament and of the Council, which limits the admissible grounds for restrictions to the free movement of persons for reasons relating to the protection of public policy, public security or public health, without mentioning the rights and freedoms of other citizens, as provided for in the constitution.

Konstitutsionen sad, judgment of 31 March 2011, no. 2 (P-2-2011-KC), Varhoven administrativen sad, interpretative judgment of 22 March 2011
www.legalworld.bg/; www.sac.government.bg/; www.pravoto.com/

IA/39240-A
IA/39241-A

[NTOD]

Denmark

Treaty of Lisbon – Application to have the law ratifying the Treaty declared unconstitutional –* Locus standi - *Admissibility

Having been asked to rule on appeal, the Højesteret found that an appeal lodged by 26 Danish citizens before the Østre Landsret (Eastern High Court) against the Prime Minister and Minister for Foreign Affairs with regard to the constitutionality of the law ratifying the Treaty of Lisbon was admissible. It sent the case back to the Østre Landsret so it could rule on the substance.

As regards the case's substance, the appellants claimed that the Treaty of Lisbon transferred powers to international authorities and that, as a result, the ratifying law should not merely have been adopted by a simple majority in the Danish parliament (which is what happened). They argue that it should have been adopted in line with the procedure for transferring powers to international authorities, set out in Article 20 of the Danish constitution, which requires approval by a majority of five-sixths of the parliament's members or a simple majority of members and a referendum.

First of all, the Højesteret noted that the appellants did not question that they did not have *locus standi* as the result of a specific dispute involving them personally. It then observed that:

"The parties disagree on the significance, in relation to Article 20 of the constitution, of the changes to the rules on the powers of the Community institutions and the rules on votes provided for by the Lisbon Treaty. This disagreement relates to general and essential areas of life, and thus matters that are of great importance to the Danish population at large. Given the considerable and general importance of the dispute, the appellants have a significant interest in the appeal. Making access to justice dependent upon acts of law that have a real effect on the appellant's personal situation, on the basis of the new provisions of the treaty, would not provide a better reason for the dispute. Consequently, the Højesteret finds that the appellants have sufficient *locus standi*."

In this connection, the Højesteret referred to its judgment of 12 August 1996 (Ufr. 1996.1300H), in which it decided, for similar reasons, that an appeal lodged against the Prime Minister by 11 Danish citizens was admissible. This appeal aimed to have the law ratifying the Treaty of Maastricht declared unconstitutional. The appellants in that case claimed that the ratifying law, which was adopted in line with the procedure for transferring powers to international authorities, as provided for by Article 20 of the constitution, should not have been adopted using that procedure because the procedure only applied to very clearly-defined transfers of power. The appellants argued that the transfer of powers was not clearly defined, so the Treaty of Maastricht should have been ratified through the procedure for constitutional amendment, set out in Article 88 of the constitution, which is still more cumbersome. This appeal was rejected on substance (Ufr. 1998.800H).

Højesteret, judgment of 11 January 2011, (Sag 336/2009),
www.domstol.dk/hojesteret/nyheder/Pages/default.aspx

IA/32638-A

[JHS]

Spain

Social policy – Protection of workers' health and safety – Organisation of working time – Right to paid annual leave – Workers' right to take paid annual leave after the date set in the employer's holiday calendar in the event of temporary incapacity before the start date of the annual leave – Consequences of the Schultz-Hoff judgment

Having been asked to rule on an appeal in cassation for the unification of case law (*recurso de casación para la unificación de la doctrina*) against a judgment by the Labour Chamber of the Tribunal Superior de Justicia de Andalucía (Granada) that overturned a decision issued by a judge of the Juzgado de lo Social no. 6 de Granada on 16 December 2009, the Labour Chamber of the Tribunal Supremo (Supreme Court) handed down a judgment on 8 February 2011 that confirmed the case law established by its judgment of 3 October 2007

on the right to paid annual leave.

In Spain, the right to paid annual leave is recognised by Article 40(2) of the constitution. By virtue of Article 38(2) of the Workers' Code, "the leave period(s) shall be fixed by mutual agreement of the employer and the employee, in line with the provisions of any collective agreements on annual holiday planning […]".

The dispute in the main proceedings originated from the request of an employee, who had been working at the Ministry of Defence since 1974, that his employer recognise his right to paid annual leave for 2008. The Ministry of Defence refused to recognise this right given that the employee had been temporarily incapacitated from 10 March 2008 to 26 February 2009 and had therefore been unable to take paid annual leave in 2008 or before 15 January of the next year, which was the date stipulated in Article 45(6) of the collective agreement for government employees.

The judge at the Juzgado de lo Social no. 6 de Granada found that this refusal to grant annual leave to the employee, who had become incapacitated prior to the set annual leave period, infringed upon the employee's right to paid annual leave.

The Tribunal Supremo referred to its judgment of 24 June 2009, in which it followed the interpretation of Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time used in the European Court of Justice's judgments of 20 January 2009 (Gerhard Schultz-Hoff and Stringer, C-350/06 and C-520/06, ECR p. I-179) and 10 September 2009 (Vincente Pereda, C-277/08, ECR p. I-8405). It reiterated what it had said in its judgment of 27 April 2010, namely, that "temporary incapacity beginning before the start of the set annual leave period and preventing the employee from taking paid annual leave may and must not be an obstacle cancelling out the employee's right to annual leave […]". Nonetheless, it also pointed out that "temporary incapacity beginning after the start of annual leave should be treated differently, i.e. as a risk to be borne by the employee, to incapacity beginning before the start of the set annual leave period and this preventing the employee from exercising the right to take paid annual leave during the stipulated periods in the company's holiday calendar".

Consequently, the Tribunal Supremo upheld the appeal in cassation for the unification of case law (*recurso de casación para la unificación de la doctrina*) lodged by the employee's counsel and overturned the judgment of the Labour Chamber of the Tribunal Superior de Justicia de Andalucía (Granada), thus the decision of the judge of the Juzgado de lo Social no. 6 de Granada. .

Tribunal Supremo, Sala de lo Social, judgment of 8 February 2011, Sentencia nº 844/2011, www.poderjudicial.es/search/index.jsp

IA/32663-A

[MEBL]

France

Conseil constitutionnel – Powers – Retrospective review of the constitutionality of a law transposing a directive – National court lacks jurisdiction in the event of faithful transposal – Limits – Absence of equivalent protection in EU law and violation of a principle that is inherent to France's constitutional identity

The Kamel D. ruling was the first time that the mechanism for retrospective constitutional review of laws was used for the provisions of a law transposing a directive. This mechanism, which came into force on 1 March 2010, enables the Cour de cassation and the Conseil d'État to refer a "priority question on constitutionality" (hereafter referred to as "QPC", see *Reflets no. 2/2010*, p. 31).

In the case in point, the QPC related to the provisions of Article L. 712-2 of the Code governing Entry and Residence of Foreigners and the Right of Asylum (CESEDA), which transposes Directive 2004/83/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Having been asked to rule by the Conseil d'État, under the conditions laid down in Article 61-1

of the French constitution (decision of 8 October 2010, no. 338505), the Conseil constitutionnel found that it had no jurisdiction to rule on the constitutionality of the provisions in question, since these were merely "limited to the necessary consequences of unconditional and precise provisions [the provisions of Article 17 of Directive 2004/38/EC of the European Parliament and of the Council]" without calling into question "a rule or […] a principle inherent to the constitutional identity of France" (recital 3).

The Conseil constitutionnel justified this decision using reasoning that it had already applied to constitutional review prior to a law's entry into force, in its 10 June 2004 decision on the law on trust in the digital economy (no. 2004-496 DC), which was subsequently adopted by the Conseil d'État in its 8 February 2007 decision on the Société Arcelor Atlantique case (no. 287110).

By virtue of this case law, a court asked to rule on the constitutionality of a law that faithfully transposes a directive must first find out whether EU law provides for equivalent protection to that provided in constitutional law and, unless there is a serious obstacle, set aside the argument based on ignorance of a provision or principle of constitutional value or, otherwise, refer a preliminary question to the European Court of Justice. National courts only have jurisdiction to directly examine the constitutionality of the contested provisions if there is no equivalent protection in EU law. By contrast, the Conseil constitutionnel does have the power to review the constitutionality of the provisions of a law transposing a directive-even literal – if they violate a rule or principle that is inherent to France's constitutional identity.

With this ruling, which was made after the European Court of Justice's judgment of 22 June 2010 (C-188/10 and C-189/10, Melki and Abdeli, see *Reflets no. 3/2010,* p. 14), the Conseil constitutionnel acted consistently with its case law to date by referring to the jurisdiction, in principle, of the EU court to assess the validity of the directive and by recognising as a standard for protection of fundamental rights that which is guaranteed by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights ("only a court of the European Union to which a preliminary ruling has been referred may check the directive's conformity with the fundamental rights guaranteed by Article 6 of the Treaty on European Union", recital 3), while reiterating that it could potentially have jurisdiction to rule in such matters.

Conseil constitutionnel, judgment of 17 December 2010, Kamel D., no. 2010-79 QPC, www.legifrance.gouv.fr

IA/32933-A

[VERDIIS]

Greece

EU law – Principles – Right to naturalisation – Absence – Creation of specific criteria for that purpose – Absence – Matter relating solely to national sovereignty – National consciousness a requirement for naturalisation – Unconstitutionality of criteria disregarding a lack of national consciousness – Reference to the Plenary Assembly

Through decision no. 350/2011 of 2 February 2011, which gave rise to numerous comments, the Symvoulio tis Epikrateias (Council of State, hereafter referred to as "the SE") ruled two series of provisions on the condition of foreigners in Greece to be unconstitutional. The first series – which was handled second in the judgment – consisted of Articles 14 to 21 of law no. 3838/2010 giving third-country nationals who meet certain conditions the right to vote and be elected in first-level local and municipal elections, namely those dealing with the appointment of elected bodies responsible for the administration of towns and municipalities. The constitutional provisions that go against this measure are contained in Articles 1(2), 1(3), 52 and 102(2) of the Greek constitution.

With regard to this first aspect, the decision stated that the right to elect and be elected constituted a public responsibility dedicated to the exercise of popular sovereignty, yet popular sovereignty can only be exercised by the Greek people, which consists exclusively of Greek

citizens who have the right to vote. Consequently, the right to vote and the right to be elected are the sole preserve of Greek citizens and may not be granted to non-Greek nationals without a prior revision of the constitution. The decision concluded that the provisions creating such rights were invalid for that reason.

The second aspect handled in the decision related to the conditions for acquiring Greek nationality and, because of its importance, was referred to the SE's Plenary Assembly. The SE found that the provision in question was also unconstitutional – in this case, it was Article 1A of law no. 3838/2010, which sets out new ways of acquiring Greek nationality, namely through the birth of child to non-Greek parents who have lived in Greece for at least five years or the completion of an education covering at least six school years in Greece by a child of non-Greek parents. After providing a long list of reasons for its decision, the SE concluded that such methods of acquiring nationality are unconstitutional in that they could lead to denial of the national character of the State, which is protected by a series of constitutional provisions (Articles 1(2), 1(3), 4(3), 16(2), 21(1), 25(4), 51(2) and 108) while not guaranteeing that foreigners acquiring nationality in this way would integrate into Greek society. To reach this conclusion, the SE began by arguing that foreigners do not have a subjective right to naturalise and that there are no international instruments requiring the national legislator to use certain fixed criteria for naturalisation. These criteria are determined by the State, in exercise of its sovereignty, and are subject to the constitution alone. From this point of view, nationality law must not allow individuals who do not have substantial connections with Greece to become part of the Greek people – the supreme body of the State – particularly if they lack Greek origins and national consciousness, elements which, in the words of the decision, constitute "the very core of the nation and nationality", which are nonetheless present in members of the Greek diaspora, which is why their naturalisation is subject to favourable conditions and follows a simplified procedure. In the view of the SE, acquisition of Greek nationality should constitute the final step in foreigners' integration into Greek society and should not simply be a method of integrating foreigners who have no Greek national consciousness.

Symvoulio tis Epikrateias, decision of 2 February 2011, no. 350/2011, www.ste.gr/Prosfates_Apofaseis

IA/32299-A

[RA]

Ireland

Copyright – Protection – Limits – Internet piracy – Lawfulness of an agreement preventing Internet access in the event of repeated copyright infringements - Admissibility

In a judgment handed down on 16 April 2010, the High Court confirmed that an agreement concluded between four record companies and an Internet service provider was lawful. Under the terms of this agreement, the Internet service provider could cut a subscriber's Internet access if the subscriber repeatedly violated copyright. The agreement sets out a method – known as the "three strikes" rule – for dealing with illegal downloading. The first time, the record companies detect the computers used to make illegal downloads and thus violate copyright. The record companies pass this information on to the Internet service provider, which identifies the subscriber and sends the relevant person a notification. If a second instance of copyright is detected, the Internet service provider must inform the subscriber that Internet access will be cut off if illegal downloading continues. Internet access is cut off if copyright is violated a third time.

Within the context of this case, Mr Justice Charleton was asked to rule on the compatibility of the aforementioned agreement with national legislation on data protection, namely the Data Protection Acts 1988-2003. The Data Protection Commissioner (national authority responsible for protecting individuals' rights, which are listed in the Data Protection Acts) argued that the agreement could lead to unwarranted intrusions into subscribers' private lives. It also questioned the suspension of Internet access and claimed that such a measure could constitute an unjustified violation of the fundamental rights and legitimate interests of

subscribers. The judge dismissed the Data Protection Commissioner's arguments, finding that in the case in point, the purpose of the agreement was to reduce theft over the Internet of material protected by copyright. In the judge's view, the noble nature of this aim means that it takes precedence over any legitimate interests that a subscriber may have. Hi did recognise that cutting Internet access was a severe penalty that may conflict with fundamental freedoms, but set aside this argument in the case in point, emphasising that there is no such thing as freedom to break the law. Consequently, he concluded that the agreement between the parties was legal and that it does not represent an unjustified violation of subscribers' fundamental rights.

High Court, judgment of 16 April 2010, EMI Records and others v. Eircom Ltd, [2010] IEHC 108, www.courts.ie

IA/ 32659-A

[SEN]

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Copyright – Protection – Limits – Internet piracy – Application for an injunction requiring an Internet service provider to prevent copyright infringements – Inadmissibility

In a judgment handed down on 11 October 2010, the High Court refused an application for an injunction, filed by a number of record companies, to require the defendant, an Internet service provider, to prevent copyright infringements by third parties who use the defendant's services to download music illegally. More specifically, the appellants demanded that the defendant be required to prevent its subscribers from accessing a piracy website called "thepiratebay.org". It should be noted that the appellants would actually have preferred to implement a "three strikes" solution, such as that described in the above case. However, the defendant rejected this proposal. For its part, the defendant argued that an injunction could not be granted in the case in point on the grounds that the Internet services it provided were a "mere conduit" and that consequently, it could not be held legally liable for the effects of illegal downloading.

The appellants made their application on the basis of Section 40(4) of the Copyright and Related Rights Act 2000, which stipulates that where a person who provides facilities is notified about a copyright infringement, that person shall be held liable for the infringement if no action is taken to remove the infringing material as soon as practicable. In his decision, Mr Justice Charleton analysed the scope of national legislation, particularly Section 40(4) of the 2000 Act, and its consistency with European directives on copyright and electronic commerce, namely, Directives 2000/31/EC, 2001/29/EC and 2002/21/EC of the European Parliament and of the Council. He also performed a comparative analysis of similar legal provisions to fight copyright infringement over the Internet in other legal systems (the United States, the United Kingdom, France and Belgium). In light of this in-depth analysis, the judge criticised the lack of an appropriate remedy in Ireland, especially the lack of specific provisions to block, divert or interrupt Internet communications intent on breaching copyright. Given that it was impossible for infringing data to be removed by a temporary communication sent by Internet service providers, the measure provided for in Section 40(4) of the 2000 Act was not appropriate in the case in point. Although the judge recognised that an injunction blocking access to the relevant website would be justified in the case in point, he had to find that he did not have the power to grant one because there were no relevant national legal provisions to that effect. He concluded from this that Ireland was not yet fully in compliance with European law in the domain.

High Court, judgment of 11 October 2010, EMI Records [Ireland] and others v. UPC Communications Ireland Ltd, [2010] IEHC 377, www.courts.ie

IA/ 32661-A

[SEN]

Italy

Competition – Inter-company agreements that restrict competition – Abuse of dominant position – Broadcasting rights for sporting events (football matches) – Award to the dominant company on the market – Definition of the relevant market – Market including

satellite and digital terrestrial platforms – Terms of the offer for different packages of broadcasting rights for football matches, aiming to maintain competition on the market in question

The Tribunale di Milano ruled on an application for interim relief filed by a company providing pay-television services by satellite (hereafter referred to as "Conto TV"). The application aimed to suspend the enforcement of the decision of the Lega Nazionale Professionisti (which manages the allocation of broadcasting rights for football matches of the Italian Serie A – the top division – for the 2011-12 season, hereafter referred to as "Lega Calcio") awarding the aforementioned broadcasting rights to Sky Italia srl. The appellant argued that the contested decision (which had also been verified by the Italian competition authority) breached rules on free competition, and more specifically Articles 101 and 102 TFEU. In the appellant's view, Lega Calcio had set out conditions relating to the organisational resources in the call for tenders for the allocation of the aforementioned rights, and in practice, these conditions favoured the dominant operator on the satellite market, Sky Italia. The appellant concluded that this meant Lega Calcio had abused its dominant position as regards the allocation of broadcasting rights.

Most of the court's analysis focused on defining the relevant market. It found that the geographical market had a national dimension. It also found that the product in question covered the broadcasting – on analogue, digital and pay satellite television – of football matches from the top and second national divisions, as well as UEFA Cup and Champions' League matches involving Italian teams – and so not only top-division matches – and that it only excluded the broadcasting of other sporting events and programmes of a different nature. Furthermore, it considered that the commitments made by Lega Calcio as part of the administrative procedure conducted by the Italian competition authority were sufficient to rule out any doubts about the supposedly anti-competitive scope of Lega Calcio's offer of packages of broadcasting rights for football matches. Besides, the terms of the offer for these packages were subject to restrictive legislation (see legislative decree no. 9 of 9 April 2008, GURI no. 27 of 1 February 2008). In conclusion, the call for tenders issued by Lega Calcio did not constitute an anti-competitive behaviour that breached Articles 101 and 102 TFEU since the terms of the services offer in question were regulated by law and the way the packages were put together did not prevent the entry of other operators into the pay-TV sector.

The court's decision that Lega Calcio's call for tenders did not breach competition rules was mainly based on the broader definition of the market that was used in this case. According to this definition, the market included matches that were not top-division matches and covered different broadcasting platforms, both competing and complementary. For this reason, the court found that having different packages of broadcasting rights for the different platforms was an appropriate way of preserving free competition on the pay-TV market to the extent that the various operators for each of these platforms could access the offer and was subject to limitations as regards the exclusive acquisition of broadcasting rights for platforms on which they were not active.

Tribunale di Milano, judgment of 24 May 2010, Soc. conto tv v. Lega naz. Professionisti

IA/32845-A

[MSU]

Third-country national or stateless person – Subsidiary protection – Conditions – Real risk of suffering serious harm in the return country

In keeping with the European Court of Justice's interpretation of Article 11(1) of Council Directive 2004/83/EC, the Corte di Cassazione declared that any third-country national or stateless person was eligible for subsidiary protection if that person faced a real risk of suffering serious harm, i.e. the death penalty or execution, torture, inhuman or degrading treatment or punishment or serious and personal threats to his or her life.

The aforementioned directive introduced this later, complementary status in parallel to refugee status. According to the directive, any third-country national or a stateless person who

does not qualify as a refugee is eligible for subsidiary protection.

In its judgment of 2 March 2010 (Aydin Salahadin Abdulla, C-175/08, Kamil Hasan, C-176/08, Ahmed Adem, Hamrin Mosa Rashi, C-178/08 and Dler Jamal, C-179/08, not yet published), the European Court of Justice ruled that the withdrawal of refugee status did not affect recognition of the status granted by subsidiary protection.

The Corte di Cassazione added that subsidiary protection cannot simply be refused in cases where appellants have not expressed opinions contrary to those of their countries' government. Consequently, the court must verify whether there is indeed a real risk of serious harm by examining the situation in the country to which the third-country national or stateless person would be returned. Moreover, in such cases, it is not necessary to demonstrate the continued existence of *fumus persecutionis*, unlike in cases linked to refugee status.

This decision related to an appeal lodged by a Cameroonian national, who would be subject to a restrictive measure in his own country, against a decision by the Corte di Appello denying the existence of conditions that would give eligibility for subsidiary protection. According to the court of second instance, the appellant was not an opponent of the government but a simple mototaxi driver who had taken part in a demonstration against rising petrol prices and could have committed non-political crimes. In addition, the Corte di Appello highlighted that the political situation in the country should only be taken into account if the appellant expressed political or ideological opinions contrary to those expressed by the government.

However, the Corte di Cassazione did not share the opinion of the court of second instance. Instead, it pointed out that the Corte di Appello had to check why the appellant was subject to a restrictive measure in his country of origin and determine whether there existed any conditions that would require the appellant to be granted subsidiary protection.

Corte di Cassazione, sezione VI, order of 24 March 2011, no. 6880,
www.dejure.giuffre.it

IA/32838-A

[GLA]

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Fundamental rights – Principle of equal treatment and non-discrimination – Immunity from legal proceedings – National law providing for legitimate impediment to senior civil servants appearing in court – Partial unconstitutionality

The Corte Costituzionale turned its attention once more to the issue of legitimate impediment to senior civil servants appearing in court as a new law (law no. 51/2010 putting forward a mechanism for invoking this impediment for senior civil servants and, specifically, members of the government: the president of the Italian Council of Ministers and the ministers) was adopted on the matter.

This new judgment is part of a body of constitutional case law (of which there has been a great deal when it comes to legitimate impediment to senior civil servants appearing in court) that has attracted much interest among the media and the international community (see Corte Costituzionale judgments no. 225 of 6 July 2001, no. 24 of 20 January 2004, no. 262 of 19 October 2009 and no. 23 of 25 January 2011, the subject of this commentary).

The order for reference in the case in point raised the issue of the incompatibility of law no. 51/2010 with Articles 3 (principle of equal treatment) and 138 (procedure for adoption of constitutional laws, compulsory in some matters) of the constitution. This law introduced, through an ordinary law, a prerogative for members of the government, which would allow them to argue that there was a legitimate impediment to them appearing in court. According to the Tribunale di Milano, which referred the matter to the Corte Costituzionale, this law gave a rather vague definition of scenarios constituting impediments, in the aim of preventing the court from being able to assess whether there was an impediment and how relevant it was in each specific case. In the Tribunale di Milano's view, this created a sort of conclusive presumption that there was an impediment and, in fact, a privilege that

violated the principle of equal treatment of individuals before the law. The Corte Costituzionale reviewed the constitutionality of each of the contested provisions, particularly sections 1 to 6 of Article 1 of the aforementioned law. With regard to the provision listing the government activities that could constitute a legitimate impediment, the Corte Costituzionale found that the provision did not create a conclusive presumption but rather provided guidelines to enable the court to assess whether there was an impediment. Secondly, with regard to the provision stipulating that if there was a legitimate impediment (as defined by the law), the court should postpone the hearing to a later date of its own motion, the Corte Costituzionale found that the provision was unconstitutional as it had not provided for the court's authority to use discretion to establish whether or not an impediment existed in that specific case, thus derogating from the common system without any such derogation having been adopted in accordance with the procedures for laws of constitutional status. The Corte Costituzionale also found unconstitutional the provision introducing a special type of "continuous" impediment, lasting up to six months, for the performance of government activities. This is also a derogation from the common system. Hence, the Corte Costituzionale declared that this law was partially unconstitutional since it violated Articles 3 and 138 of the constitution and dismissed the other grievances on the grounds that they were inadmissible.

Corte costituzionale, judgment of 25 January 2011, no. 23,
www.cortecostituzionale.it

IA/32841-A

[MSU]

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Constitutional review – Revision of a judgment or sentence order – Consistency with definitive judgments of the European Court of Human Rights

The Corte Costituzionale declared Article 630 of the Criminal Code to be unconstitutional insofar as it does not provide, among the different scenarios for revision of judgments or sentence orders, for the possibility of reopening proceedings to ensure compliance with definitive judgments of the European Court of Human Rights (hereafter referred to as "the ECHR") pursuant to Article 46(1) of the European Convention on Human Rights (hereafter referred to as "the Convention").

In the case in point, the Corte di Appello di Bologna raised a question as to the constitutionality of Article 630 of the Criminal Code in relation to Article 117(1) of the Italian constitution and Article 46 of the Convention. This question was raised on the basis of an ECHR judgment declaring that Article 6 of the Convention had been breached.

It emerged from the ECHR judgment that this breach was due to the fact that the appellant was sentenced on the basis of declarations made during the investigation stage by three other accused parties, whose testimony was not heard at the trial as they chose to exercise their right to remain silent.

It should be noted that according to the ECHR, the requirement to comply with its judgments also implies that States commit to reopen proceedings whenever this proves necessary with a view to ensuring *restitutio ad integrum* for the party concerned if that party's constitutional guarantees have been violated.

The Corte Costituzionale stressed that protection such as that developed by the ECHR was not guaranteed by the Italian constitution itself and that consequently, it was necessary to refer to the domestic Criminal Code. From that point of view, revision, which consists of reopening the entire proceeding, including the acceptance of evidence, is the only measure that could meet the conditions required by the ECHR.

Consequently, the court declared Article 630 to be unconstitutional on the grounds that it does not provide for the special case of revision to comply with definitive judgments of the ECHR.

Furthermore, the court pointed out that the need to reopen proceedings should be evaluated in light of the objective nature of the violation, while taking into account the instructions given in the ECHR judgment.

Finally, the Corte Costituzionale stated that intervention by the legislator was still necessary and that application of revision was only justified because there was no other, more appropriate measure.

Corte Costituzionale, judgment of 7 April 2011, no. 113, www.dejure.giuffre.it

IA/32839-A

[GLA]

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Approximation of laws – Directive 98/34/EC of the European Parliament and of the Council – Procedure for the provision of information in the field of technical standards and regulations – National legislation prohibiting the reproduction of the rules of poker in gaming machines – Duty to provide information – Absence

In its judgment of 21 October 2010, the Corte di Cassazione ruled that Italian legislation absolutely prohibiting gaming machines reproducing the rules of poker was not contrary to EU law. Consequently, it did not refer a preliminary question to the European Court of Justice.

The origin of this judgment was an appeal lodged by a company that owns video game machines against sanctions that were applied by the public authorities on the grounds that the games made available to the public were illegal.

According to the company, the relevant Italian legislation should be considered inapplicable because it violates the provisions of Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services. The appellant held that the Italian legislator did not comply with the requirement set down in Article 8 of the directive, namely, the requirement to communicate national regulations to the Commission.

However, the Corte di Cassazione held that a national provision prohibiting gaming machines that reproduce the rules of poker is not a technical regulation, which is the only type of rule that needs to be communicated to the Commission, since the rules of poker do not relate to the characteristics of the gaming machines but rather to the game for which they may be used.

The court also pointed out that the prohibition on gaming machines that reproduce such rules exists due to the need to protect public policy.

As a result, the administrative sanctions applied to the appellant company are justified.

Corte di Cassazione, judgment of 21 October 2010, no. 21637/10, www.lexitalia.it

IA/32837-A

[VBAR]

Freedom of establishment – Freedom to provide services – Council Directive 77/249/EEC – Access to the profession of lawyer – Conditions – Ban on civil servants freely exercising the profession of lawyer – Admissibility in the light of EU law

With its decision of 6 December 2010, the Corte di Cassazione suspended the enforcement of decisions by various councils of the Italian Bar Association to remove certain part-time civil servants who also worked as lawyers from the Association's register. It referred a preliminary question to the Corte Costituzionale with a view to checking the constitutionality of national legislation stipulating that individuals may not work as lawyers and civil servants at the same time.

This judgment is interesting because it also looks at the issue of whether the Italian legislation is admissible in the light of EU law.

In this connection, the court found that the legislation was not contrary to EU law, since it applies to the performance of duties for public authorities and not to the way the profession of lawyer is organised. Civil servants do not perform any economic activity that is similar to the activities of a company and are not subject

to the rules of competition. Moreover, the contested legislation does not aim to regulate competition between lawyers, but rather serves the general interest by ensuring that the profession of lawyer is practised correctly and the civil servant provides a service fairly.

The court's ruling looked at the admissibility of the Italian legislation in light of Article 6 of Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services, which enables Member States to exclude lawyers in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities.

It decided that the Italian legislation is consistent with this provision of EU law in that it only applies to Italian lawyers and not to lawyers who are members of the Bar in other Member States.

Finally, the Corte di Cassazione pointed out that the directive does not govern matters like that raised in the case in point, which was to do with the exercise of the public power in question and that consequently, Member States are free to autonomously exercise their legislative power with regard to such matters.
It is worth noting that the legislation in question was subject to a decision by the European Court of Justice on 2 December 2010 (Jakubokwska, C-225/09, not yet published).

In its judgment, the ECJ decided that Articles 3(1)(g), 4, 10, 81 and 98 EC did not preclude national legislation preventing part-time civil servants from practising the profession of lawyer, despite being qualified to do so, by laying down that they are to be removed from the register of the relevant Bar Council.

It also found that Article 8 of Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as meaning that a host Member State may impose on lawyers registered with a Bar in that Member State who are also, whether full or part‑time, in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise, restrictions on the exercise of the profession of lawyer concurrent with that employment, provided that those restrictions do not go beyond what is necessary in order to attain the objective of preventing conflicts of interest and apply to all the lawyers registered in that Member State.

Corte di cassazione, judgment of 6 December 2010,n° 24689, www.lexitalia.it

IA/32836-A

[VBAR]

Latvia

Treaty of Accession of the ten Member States that joined the European Union in 204 – Transitional measures – Retention of provisions restricting the acquisition of agricultural land and forests by nationals of other Member States and by companies formed in accordance with the laws of another Member State and neither established nor registered nor having a local branch or agency in Latvia – Application to a company established in Latvia and controlled by a parent company also established in Latvia, but of which 100% of the capital is held by a resident of another Member State - Inadmissibility

With its decision of 6 September 2010, the Augstākā Tiesa (Supreme Court), acting in line with the Augstākās Tiesas Senāts (Senate of the Supreme Court) decision of 13 January 2010, recognised that a company established in Latvia was entitled to acquire a plot of agricultural land in a specific legal context. The company in question was controlled by a parent company that was also established in Latvia, but of which 100% of the capital was held by a resident of another Member State.

The court's ruling related to the interpretation of Chapter 3 of Annex VIII of the Act concerning the conditions of accession of the ten Member States joining the European Union in 2004, which was concluded and signed in Athens on 16 April 2003. The Act established a transitional period during which Latvia could maintain in force, for seven years from the date

of accession, the rules laid down in its legislation regarding the acquisition of agricultural land and forests by nationals of other Member States and by companies formed in accordance with the laws of another Member State and being neither established nor registered nor having a local branch or agency in Latvia.

The Augstākās Tiesas Senāts interpreted national law strictly and concluded that regardless of the fact that the person who held 100% of the capital of the relevant parent society (which was established in Latvia) was not on the list created by Article 28 of the law of 9 July 1992 on the privatisation of rural land (Par zemes privatizāciju lauku apvidos) and consequently was not entitled to buy agricultural land, the company, in principle, could not be placed in the same category as its shareholder and had its own rights to carry out activities, namely, the right to purchase agricultural land, as provided for in the aforementioned law. Among other things, the Augstākās Tiesas Senāts highlighted that the restrictions do not apply to companies established in Latvia by nationals or companies from other Member States.

In the case in point, the Augstākā Tiesa overturned the land registry court's refusal to register, ruling that it was inconsistent with the Treaty of Accession and Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty.

The transitional period, which was justified by the need to safeguard the socio-economic conditions for agricultural activities following the introduction of the single market and the transition to the Common Agricultural Policy in Latvia and the temporary exception to free movement of capital, which is guaranteed by Articles 63 to 66 of the Treaty on the Functioning of the European Union, was extended until 30 April 2014 by a Commission decision. This is the maximum period provided for in the Treaty of Accession. The Saeima (the Latvian parliament) adopted the relevant amendments with the law of 14 April 2011.

Augstākā Tiesa, decision of 6 September 2010, no. PAC-2095,
Augstākās Tiesas Senāts, decision of 13 January 2010, no. SKC-410, www.at.gov.lv

IA/32642-A
IA/32643-A

[AZN]

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Social security for migrant workers – Unemployment of a non-frontier worker employed in another Member State – Claim for social security benefits in the Member State of residence – Concept of residence

The Augstākās Tiesas Senāta Administratīvo lietu departaments (administrative division of the Senate of the Supreme Court) ruled admissible the interpretation of the Administrative Court of Appeal that required the national authorities to examine an application for social security benefits by an unemployed person who had been employed in another Member State for two years and to bear in mind that she could continue to habitually reside in Latvia and have her principal centre of interests there. Referring to the case law of the European Court of Justice, and more specifically the Di Paolo (judgment of 17 February 1977, 76/76, ECR p. 315) and Knoch (judgment of 8 July 1992, C-102/91, ECR p. I-4341) cases, the Augstākās Tiesas Senāts (Senate of the Supreme Court) decided, with its judgment of 28 June 2010, that European Union law requires the Valsts sociālās apdrošināšanas aģentūra (National Social Security Office), which manages unemployment benefits, to examine an application made by a wholly unemployed non-frontier worker who worked in a Member State other than the competent Member State and to apply, for this purpose, the concept of residency outlined in Article 71(1)(b)(ii) of Regulation (EEC) no. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community. The concept of the worker's residence involves taking into account the duration and continuity of residence before the party concerned left the country, the duration and purpose of that party's absence, the nature of the employment in the other Member State and the intention of the party concerned, as emerges from the circumstances.

In the case in point, the Court of Appeal noted that the party concerned had lived her whole life in Latvia and her husband and two children still lived there at the time. She left the country for purely economic reasons and while she was living in England, she maintained close ties with Latvia (thanks to the money provided by the party concerned, her family was able to buy some land and secured permission to build a family home).

In this context, the administrative court deemed inapplicable the concept of residence provided for in the Convention of 20 November 1996 between the Republic of Latvia and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion and in the law on income tax (Par iedzīvotāju ienakuma nodokli), according to which people are only governed fiscal matters and could not be applied to social matters.

Augstākās Tiesas Senāts, judgment of 28 June 2010, no. SKA-424/2010,
www.at.gov.lv

IA/32644-A

[AZN]

Lithuania

Approximation of laws – Review proceedings concerning the award of public supply and public works contracts – Directive 2007/66/EC of the European Parliament and of the Council – Requirement to interpret national law in line with the purpose of the directive

In its order of 5 April 2001, the Lietuvos Aukščiausiasis Teismas (Supreme Court, hereafter referred to as "the LAT") ruled on the interpretation of Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, which had not been transposed into national law at the time of the facts of the case and for which the transposal deadline had not yet passed.

The dispute related to the legal effects of a public contract that was concluded in violation of mandatory provisions and various principles relating to the award of public contracts. In the case in point, the court of first instance did not declare the public contract ineffective. The court of appeal confirmed this decision with a view to protecting the public interest. Its reasoning was based on Article 2d(3) of Directive 2007/66/EC of the European Parliament and of the Council, which provides that provide a review body may not consider a contract ineffective, even though it has been awarded illegally, if the review body finds that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

In its order, the LAT first pointed out that even before a directive's transposal deadline has passed, national law should be interpreted in line with the directive – not generally, but to the extent that such interpretation is required to avoid undermining the purpose of the directive. That means that interpretation of national law is limited by one specific goal, namely that of not seriously compromising the result to be achieved by the directive.

The LAT also found that it would be appropriate to evaluate the significance and place of keeping public contracts ineffective within the system of the objectives of Directive 2007/66/EC of the European Parliament and of the Council.

In this connection, the LAT observed that keeping public contracts ineffective was not the main objective of the aforementioned directive, but rather one of the conditions for achieving the directive's primary objective. Keeping public contracts ineffective is an exception to the supplier protection system and is offset by the application of alternative sanctions.

The LAT also raised the fact that even after the deadline for transposing Directive 2007/66/EC of the European Parliament and of the Council had passed, Member States could decide not to keep public contracts effective and that such decisions could not be viewed as violations of the principle of the efficiency of review proceedings concerning the award of public contracts. Pursuant to the directive's twentieth recital, the Member States may apply stricter sanctions in accordance with national law.

Consequently, the LAT upheld the court of appeal's decision insofar as it was made to protect the public interest, but dismissed the argument based on the application of Directive 2007/66/EC of the European Parliament and of the Council. In so doing, the LAT amended the decision by maintaining the effects of the public contract in question for a limited period only, as required to protect the public interest.

Lietuvos Aukščiausiasis Teismas, order of 5 April 2011, no. 3K-3-155/2011, www.lat.lt

IA/32656-A

[LSA]

Netherlands

Visas, asylum, immigration – Immigration policy – Directive 2008/115/EC of the European Parliament and of the Council – Transposal – Detention decision – Risk of absconding

In a judgment handed down on 21 March 2011, the Raad van State ruled that the Netherlands had not correctly transposed Article 3(7) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter referred to as "the directive").

The case related to a decision by the competent Dutch authorities to place in detention a third-country national (hereafter referred to as "the alien") who was supposed to leave Dutch territory since they believed that the alien may abscond. In the view of the competent authorities, this measure was necessary for the protection of public policy and public safety.

Ruling in the first instance, the Rechtbank 's-Gravenhage overturned the detention decision and awarded the alien compensation.

Ruling on the appeal, the Raad van State upheld the decision of the Rechtbank 's-Gravenhage and ruled that Article 3(7) of Directive 2008/115/EC of the European Parliament and of the Council, according to which risk of absconding" must be determined based on objective criteria defined by law, was not transposed correctly into Dutch law. It considered that the Vreemdelingencirculaire, which contains the criteria used to determine whether there is a risk of an alien absconding, is not a law (as required by the directive) but rather a guideline.

Nonetheless, the Raad van State found that the relevant Dutch legislation – namely the Aliens Act 2000 – could be interpreted in line with the directive in the sense that third-country nationals may only be placed in detention if they attempt to obstruct their expulsion.

The Raad van State argued that point 70 of the European Court of Justice's judgment of 30 November 2009 (Kadzoev, C-357/09 PPU, ECR p. I-11189), according to which the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC of the European Parliament and of the Council, still applies when a person is covered by the scope of the directive and, consequently, is not limited to the issue of knowing whether a third-country national can be placed in detention, under certain conditions, once the maximum detention period has passed. It found that Article 15(1) of the directive and, by extension, the relevant Dutch legislation should be interpreted in the sense that reasons of public policy cannot be used as the basis for a detention decision made to protect public policy and public safety. However, the Raad van State considered that reasons of public policy could be taken into account if they showed that there was a risk of absconding or that an attempt had been made to obstruct the expulsion.

Given that the detention decision did not refer to any reasons showing an attempt by the alien to prevent his expulsion, the Raad van State upheld the decision by the Rechtbank 's-Gravenhage.

Raad van State, 21 March 2011, S.H. Hassan v. Minister for Immigration and Asylum, LJN BP9284, www.rechtspraak.nl

IA/33122-A

[SJN] [WAALCAR]

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International agreements – EEC-Turkey Association Agreement – Free movement of persons – Freedom of establishment – Freedom to provide services – Standstill clause and non-discrimination rules

In the case in point, the Raad van State ruled that Article 9 of the EEC-Turkey Association Agreement, which prohibits all discrimination on grounds of nationality, should be read in conjunction with Article 41(1) of the Additional Protocol to the aforementioned EEC-Turkey Association Agreement (standstill clause) and that, consequently, any admission restrictions that existed on 1 January 1973 may be retained, even if they are discriminatory.

This case related to an application by a Turkish national for a fixed-term residence permit allowing him to work independently in the Netherlands. His application was rejected on the grounds that his activities were not of "essential interest" to the Netherlands. By virtue of the Vreemdelingencirculaire 2000, there is a system of points for measuring the added value a company brings to Dutch society.

The Turkish national argued that this system contravened Article 9 of the EEC-Turkey Association Agreement, Article 54 EC and Article 41(1) of the Additional Protocol to the Association Agreement. In his opinion, Turkish nationals have the same rights as European citizens if they wish to settle in the Netherlands to carry out a professional activity. Given that European citizens do not have to submit business plans (but Turkish nationals do), the Turkish national in question held that Dutch legislation in the matter breached the principle of non-discrimination.

Referring to the European Court of Justice's judgments in the Savas (judgment of 11 May 2000, C-37/98, ECR p. I-2927) and Abatay (judgment of 21 October 2003, C-317/01 and C-369/01, ECR p. I-12301) cases, the Raad van State observed that the aim of the EEC-Turkey Association Agreement was to remove restrictions on freedom of establishment and freedom to provide services and that consequently, by virtue of Article 41(1) of the Additional Protocol to the agreement, it is prohibited to introduce new restrictions on the freedom of establishment and the freedom to provide services. However, the Raad van State argued that this only applies to new restrictions, and not to restrictions that existed before 1 January 1973. The Raad van State confirmed that the criterion of "essential interest" already existed in January 1973, meaning that it was not a new restriction, hence it could be retained even if it was discriminatory.

Raad van State, 15 March 2011, the alien v. Secretary of State for Justice, LJN BP8383, www.rechtspraak.nl

IA/33123-A

[SJN] [WAALCAR]

Poland

European Union – Police and judicial cooperation in criminal matters – Framework decision on the European arrest warrant and surrender procedures between Member States – Implementation of national law – Mandatory grounds for non-enforcement of the arrest warrant – European arrest warrant for the purpose of criminal proceedings – National provision providing for the non-enforcement of an arrest warrant that infringes civil and human rights and freedoms – Scope – Executing judicial authority finding no offence – Description of offence insufficient for the executing judicial authority to determine the nature and legal classification of the offence – Inclusion

In its judgment SK 26/08 of 15 October 2010, which was handed down after examination of a constitutional complaint by a Polish citizen who was subject to a European arrest warrant for the purpose of criminal proceedings, issued by a British court, the Trybunał Konstytucyjny (Polish Constitutional Court) ruled on the consistency of provisions of the Polish Criminal Code (hereafter referred to as "the CC"), transposing framework decision on the European arrest warrant and the surrender procedures between Member States, with constitutional provisions giving the right to a fair trial and defence and the prohibition on extraditing a person where extradition may infringe upon civil and human rights and freedoms (Articles 45(1) and 42(2), read in conjunction with Article 55(4) of the constitution). The complainant argued that the

grounds for non-enforcement of an arrest warrant set out in the CC were not clear and complete enough, particularly as regards the possibility of surrendering a prosecuted person without prior examination of the probable nature of the offence.

The Trybunał Konstytucyjny limited its examination of the consistency of the provisions of the CC mentioned by the complainant to Article 607p(1)(5), which stipulates that European arrest warrants are not enforced if their enforcement could violate civil and human rights and freedoms. This article introduces a ground for non-execution that is not explicitly provided for in framework decision 2002/584, but that can be deduced from points 12 and 13 of the preamble to the framework decision.

The Trybunał Konstytucyjny found that Article 607p(1)(5) also includes situations where the executing judicial authority finds that the offence for which the person in question is being prosecuted was not actually committed, as well as situations where the description of the offence in the European arrest warrant does not enable the executing judicial authority to determine the nature and legal classification of the offence. In both cases, Article 607p(1)(5) of the CC provides a legal basis for the executing judicial authority to refuse to enforce the European arrest warrant issued for the purpose of criminal proceedings. The Trybunał Konstytucyjny therefore found that the provision is consistent with the constitution. In this connection, it emphasised that although European arrest warrants are not enforced automatically, the executing judicial authority is not allowed to take the place of the court of the issuing Member State and therefore may not conduct the entire procedure for submission of evidence to decide whether the offence was actually committed by the prosecuted person.

Trybunał Konstytucyjny, judgment of 5 October 2010, SK 26/08, Orzecznictwo Trybunału Konstytucyjnego, Zbiór Urzędowy, seria A, 2010, Nr 8A, poz. 73; Dz.U. Nr 189, poz. 1273, www.trybunal.gov.pol

IA/32665-A

[MKAP]

Treaty of Lisbon – Constitutional review after ratification – Provisions of the Treaty on European Union regarding ordinary and simplified revision procedures – Provisions of the Treaty on the Functioning of the European Union regarding the flexibility clause – Consistency of the contested provisions with Polish constitutional order

In case K 32/09, the Trybunał Konstytucyjny (Polish Constitutional Court) ruled on the consistency with the Polish constitution of provisions of the Treaty of Lisbon modifying Article 48 of the Treaty on European Union regarding ordinary and simplified revision procedures for treaties and Article 352 on the Treaty on the Functioning of the European Union, known as the flexibility clause. The constitutional provisions in question were Article 8(1) of the constitution, which stipulates that the constitution is the supreme norm of the Republic of Poland, and Article 90(1), which authorises the transfer of the public authorities' powers in certain matters to an international organisation, by virtue of a treaty.

The appellants (members of parliament and senators) argued that the treaty modification procedures provided for in the Treaty of Lisbon risked not sufficiently respecting Poland's position and that the treaty allowed the EU institutions to extend their own powers, despite the lack of democratic legitimacy.

The Trybunał Konstytucyjny reiterated that the Treaty of Lisbon had been ratified by the President of Poland and that the parliament had passed a law authorising him to do so. Consequently, the Treaty of Lisbon benefits from a special presumption of conformity with the constitution. This can only be overturned if it is impossible to interpret the treaty and the constitution in such a way that they are compatible. In the case in point, the constitution may be interpreted in the sense that the conditions set down in Article 90 of the constitution (regarding international agreements) must also be met for amendments to be made to treaties. Moreover, the Trybunał Konstytucyjny observed that in reality, the national parliaments' role in the ordinary revision procedure for treaties was increased by both the Treaty of Lisbon and the national

procedure created by the 2010 law on cooperation between the Polish Council of Ministers, Parliament and Senate in matters relating to the Republic of Poland's accession to the European Union, which guarantees that Poland's constitutional bodies will be involved in decision-making and will have the opportunity to present and defend national interests.

Next, with regard to the flexibility clause, the Trybunał Konstytucyjny pointed out that this clause already featured in the EC Treaty, is subsidiary in nature and cannot be used as a ground for extending the European Union's powers. Besides, it cannot be concluded that Article 352 TFEU gives the EU institutions carte blanche because it requires that the Council unanimously decides to adopt an act for this purpose, after having obtained permission from the European Parliament and the national parliaments. Furthermore, national parliaments must be kept informed of legislative initiatives, which must be submitted for re-examination if there are any doubts about their compatibility with the principle of subsidiarity.

Finally, the Trybunał Konstytucyjny ruled that the Treaty of Lisbon expresses the concept that the European Union respects the principle of safeguarding the Member States' sovereignty in the integration process, promotes both the integration process and cooperation between Member States thanks to the identity of the values and goals of the European Union (defined in the treaty) and the Republic of Poland (defined in the Polish constitution) and establishes a clear division of powers.

Trybunał Konstytucyjny, judgment of 24 November 2010, K 32/09, Orzecznictwo Trybunału Konstytucyjnego, Zbiór Urzędowy, seria A, 2010, Nr 9A, poz. 108; Dz.U. Nr 229, poz. 1506, www.trybunal.gov.pl

IA/32664-A

[MKAP]

Czech Republic

Fundamental rights – Right to respect of privacy – Directive 2006/24/EC of the European Parliament and of the Council – Protection of data on traffic and localisation data – Transposal – Necessity and proportionality requirements in a democratic State governed by the rule of law – Unconstitutionality of national provisions for transposal

The Ústavní soud (Constitutional Court) was asked to rule on the constitutionality of certain provisions of the law on electronic communications and its implementing regulation, which transposed Directive 2006/24/EC of the European Parliament and of the Council into Czech law. A group of members of parliament argued that these provisions violated the right to respect of privacy, which is protected by the Czech Charter of Fundamental Freedoms and Rights and the European Convention on Human Rights in that they allowed the collection, storage and processing of data on traffic and localisation data without meeting the requirements of necessity and proportionality or fulfilling the imperatives of a democratic State governed by the rule of law. Moreover, the members of parliament requested that a preliminary question be referred to the European Court of Justice to challenge the validity of Directive 2006/24/EC of the European Parliament and of the Council.

In its judgment of 22 March 2011, the Ústavní soud did not uphold the arguments used to justify referral of a preliminary question. It pointed out that constitutional review, which it is responsible for, must be performed according to the standards of national constitutional order, which remains the reference framework for review. However, Community law influences the creation, application and interpretation of national law, and although it is not part of the constitutional order, it must be taken into account (see *Reflets no. 2/2006,* p. 21, IA/28220-A [only available in French]). Furthermore, the directive in question gives the Member States sufficient room for manoeuvre to enable transposal that is consistent with the constitution. The national legislator decides on the arrangements for transposing the directive and is also bound by constitutional order when it comes to choosing the means through which it will achieve the result set down in the directive.

Referring to its own case law, the case law of

the ECHR and the case law of various other constitutional courts, especially the German Bundesverfassungsgericht, the Ústavní soud interpreted the content of the right to respect of privacy and the admissible exemptions. It observed that the right to self-determination of information was an integral part of the right to privacy. In the view of the Ústavní soud, the fact that there is no guarantee that individuals can control the content and scope of personal data about them that must be published, stored or processed for other purposes than initially intended is unacceptable in a free and democratic society. If individuals cannot assess trustworthiness of people with whom they may be dealing and cannot adapt their behaviour accordingly, their rights and freedoms are automatically limited. In other words, if the public authorities are omnipresent and omniscient, rights to privacy and self-determination become practically non-existent and illusory. In a democratic society, exemptions should only be granted in exceptional circumstances, and only if there is careful observance of the principles of necessity and proportionality and real and effective legal guarantees are set up to prevent arbitrariness.

In the case in point, the Ústavní soud noted that the contested national provisions went far beyond the framework provided for in Directive 2006/24/EC of the European Parliament and of the Council in terms of the volume and nature of information to be retained. With regard to the severity of the infringement of the right to privacy, which is exacerbated by the fact that it affects a large and indeterminate number of users (since it relates to systematic, preventive data collection), the Ústavní soud concluded that the provisions were far from meeting the constitutional requirements for several reasons.

Firstly, the Ústavní soud found that the national legal provisions were not clear, particularly with regard to the competent authorities to which the data in question could be transferred, the texts forming the legal basis for their power and the purpose served by such transfers. While Directive 2006/24/EC of the European Parliament and of the Council aims to ensure that data are available for the purpose of the investigation, detection and prosecution of serious crime, the contested provisions allowed unlimited access to the data in question. The Ústavní soud also considered that the provisions did not do enough to ensure the protection and security of the data, and that the affected individuals had no guarantees against misuse and arbitrariness. Consequently, it repealed the national provisions in question.

With this judgment, the Ústavní soud adopted the same position as constitutional courts in other countries (Germany, Romania, Bulgaria, Cyprus), all of which declared the national legal texts transposing Directive 2006/24/EC of the European Parliament and of the Council to be unconstitutional. The Ústavní soud also issued an *obiter dictum* expressing doubts as to the effectiveness, necessity and proportionality of the mechanism for systematic, preventive storage of the data in question, which covers almost all electronic communication. In the view of the Ústavní soud, such a mechanism could infringe on the privacy of all users of electronic communication services.

Ústavní soud, judgment of 22 March 2011, no. Pl. ÚS 24/10, http://nalus.usoud.cz

IA/33009-A

[KUSTEDI] [PES]

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Free movement of goods – Labelling and presentation of products – Multitude of applicable European Union and national provisions –Interpretation complies with EU law – Power of the national legislator in fields standardised by EU law

The Nejvyšší správní soud (Supreme Administrative Court of the Czech Republic) rejected a cassation appeal filed by the supermarket chain Tesco stores ČR against a judgment handed down by the Prague Městský soud (municipal court) that confirmed the ban on marketing certain food products (butter produced in Belgium in the case in point) on the Czech market.

The ban was put in place by the Czech Agriculture and Food Inspection Authority. During an inspection, the authority noted that the products in question bore "čerstvé máslo" ("fresh butter") labels, despite there being 48,

62 and 69 days between their production dates and their use-by dates. The Inspection Authority considered this to be in violation of a ministerial order, which specifies that only butter intended to be consumed within 20 days of production is to be labelled "čerstvé máslo".

In its judgment, the Nejvyšší správní soud added a number of important clarifications regarding the application of Czech law in a field standardised by EU law. First of all, it emphasised that regional courts have the option, not the obligation, of referring preliminary questions to the European Court of Justice (ECJ). However, if the relevant regional court does not refer a preliminary question, litigants cannot complain to the court that their rights have been violated. The Nejvyšší správní soud is the only administrative court required to submit preliminary questions to the ECJ within the meaning of Article 267 TFEU.

Nevertheless, the Nejvyšší správní soud rejected the appellant's request to refer a preliminary question, concluding that the difficulties involved in applying the rules in this matter were not due to lack of clarity in European legislative texts, but to the large number and diverse nature of the rules governing the situation in the case in point (both, national constitutional, legislative and regulatory provisions and those EU legislative provisions contained in two regulations, a directive and, lastly, the Treaty on the Functioning of the European Union itself).

According to the Nejvyšší správní soud, a clear approach was needed to resolve this dispute. This approach would have to enable correct application of all these rules, which have completely different origins and forms. As for fields generally governed by EU primary legislation, directives and, in specific areas, regulations, the Nejvyšší správní soud found that when it came to aspects not covered by such regulations (in this case, the "fresh butter" label), various checks should be performed to interpret the applicable national provisions. These checks should verify that the provisions (1) are consistent (the national regulatory decision complies with national law); (2) comply with the applicable directives; (3) if interpreted as such, they do not overlap the fields covered by the regulations; and finally (4) universal application of national provisions does not violate EU primary legislation.

It should be noted that there are no separate conditions for verification over successive stages; on the contrary, these conditions are closely linked. The Nejvyšší správní soud also considered that such an approach fully complied with the rules set out in the Ústavní soud's flagship ruling on the relationship between European law and Czech law (see *Reflets no. 2/2006,* p. 21, IA/28220-A [only available in French]).

Pursuant to the approach set out above, the Nejvyšší správní soud first ruled that the ministerial order complied with the law. It then pointed out that the courts were required to interpret national law in line with EU law, especially in cases where national provisions regarding transposal were not worded clearly. Indeed, it is not for administrative courts to perform an abstract review of legislative acts that incorrectly transpose EU law. Rather, their role is to assess the possible impact of these acts on the case in point.

Now in the case in point, there was no need to apply Commission Directive 2000/13/EC as the issue was not to discover whether the appellant had been prevented from selling products on the Czech market using the original name, but rather to find out if the description "čerstvé máslo", added especially for the products' launch on the Czech market, falls into the scope of application for national provisions. The Nejvyšší správní soud confirmed that since EU law (Council Regulation (EC) no. 2991/94) allowed Member States to set their own individual quality standards, only butter with a use-by date no more than 20 days after its production date could be described as "čerstvé máslo".

Nejvyšší správní soud, judgment of 23 July 2010, no. 2 As 55/2010-167, www.nssoud.cz

IA/33006-A

[KUSTEDI] [PES]

Citizenship of the European Union – Principle of non-discrimination on grounds of nationality – Compensation of victims of the communist regime – Refusal to grant a supplement to a state pension –Exclusion from the scope of EU law – Admissibility

The Nejvyšší správní soud (Supreme Administrative Court of the Czech Republic) was asked to rule on a cassation complaint lodged against a decision taken by the body responsible for social security in which the body in question refused to grant the appellant a supplement to his state pension because he was not a Czech national.

Supplements to state pensions are an allowance intended for individuals who suffered injustice at the hands of the communist regime. Now, the appellant undeniably suffered unjust treatment during the period in question (he was imprisoned for refusing to carry out military service) and, consequently, believed that he was entitled to a supplement to his state pension. He is currently a German national, but lived in the Czechoslovak Socialist Republic at the time and was a citizen of that country. Nevertheless, his application was refused on the grounds that Czech legislation reserved the allowance in question to individuals who were Czech nationals when their application was filed.

As a result, the appellant brought the matter before the administrative courts, claiming that Czech legislation was contrary to European Union law, notably the principle of non-discrimination set out in the Charter of Fundamental Rights of the European Union.

However, the Nejvyšší správní soud rejected this argument in its judgment of 16 June 2010. In the court's opinion, the matter of compensation for victims and dissidents of the communist regime falls outside the scope of application of European Union law, so the principle of primary law – concerning non-discrimination – was not applicable in the case in point. Besides, the supplement aims to offer some compensation for injustices caused by the communist regime and, as such, is not included in the category of social benefits, which are covered by Council Regulation (EC) no. 1408/71.

The Nejvyšší správní soud then asked whether it was consistent with Czech constitutional order to differentiate between nationals and foreigners with regard to compensation. To resolve this question, it referred to prior decisions by the Ústavní soud (Constitutional Court) and the European Court of Human Rights, both of which agreed that nationality could be a condition for access to recovered property.

In this respect, the Nejvyšší správní soud emphasised that efforts to compensate victims of the Communist regime and members of the Resistance against fascism and communism could not be questioned or considered illegal simply because compensation was not awarded to all victims, but only to Czech citizens in recognition of their involvement in liberating their country.

Nejvyšší správní soud, judgment of 16 June 2010, no. 6 Ads 155/2009-42,
www.nssoud.cz

IA/33008-A

[KUSTEDI] [PES]

Romania

Competition – Dominant position – Abuse – Postal services – Domestic direct mail postal service and commercial correspondence postal service – Granting by a State company, the largest national operator of postal services, of preferential treatment to one of its business partners

Pursuant to an investigation into abuse of a dominant position by the Romanian National Postal Company (CNPR), the Romanian Competition Council, via its Decision No 52 of 16 December 2010, fined CNPR some RON 100 million (equivalent to €24 million), an amount that represents approximately 7.2% of CNPR's turnover.

CNPR, the largest operator of postal services in Romania, is a State company controlled by the Ministry of Communication and the Information Society (which holds 75% of the shares) and by the 'Ownership Fund' (which holds 25% of the shares).

The abuse of dominant position took place on two markets. The first is the market for 'direct mail postal service' (hereafter "the Infadres service"). CNPR provides this service to businesses engaged in direct marketing, with a view to promoting products. The second is the market for the 'domestic non-priority correspondence postal service …' (hereafter referred to as "the commercial correspondence service"). This is a service provided to businesses for their various business correspondence needs (e.g., the sending of invoices).

The abuse of dominant position by the CNPR consisted, firstly, of granting one of its customers (Infopress) preferential treatment, when compared to other CNPR business partners and between 2005 and 2009, on the Infadres service market. This preferential treatment was subsequently expanded, in 2008 and 2009, to include the business correspondence service.

Secondly, the abuse of dominant position consisted, in 2008 and 2009, of awarding Infopress tariff rebates applied on a discriminatory basis with respect to other CNPR partners.

In this respect, Infopress was the only partner to benefit from certain favourable payment conditions and significant preferential tariff rebates. CNPR did not offer its other partners, in a real and unequivocal manner, the same contractual conditions for the same services provided.

The tariff rebates applicable to Infopress, stipulated in an initial addendum to the contract concluded with CNPR, were better than those provided for in CNPR's public offering and offered to other partners. Moreover, Infopress was not required to provide bank guarantees for the payment of the said Infadres service. Via a second addendum, Infopress benefitted from the maximum tariff rebates, irrespective of monthly mailing volumes, provided it achieved a certain volume over the course of one year (a period which was subsequently extended).

The Romanian Competition Council found that awarding maximum tariff rebates in advance and for a long period of time, irrespective of monthly mailing volumes and without additional charges, gave Infopress a significant competitive over its rivals and created a distortion of competition on that market.

In addition, given CNPR's monopoly on the Infadres market and the fact that CNPR is protected by structural barriers to access, the Competition Council found that granting Infopress preferential treatment based not on economic performance criteria, but rather with a view to keeping the business partner loyal, also had the effect of closing off this market, excluding CNPR's rivals and artificially maintaining its de facto monopoly on the said market.

The fine imposed on CNPR was, until 2011, the biggest ever imposed by the Romanian Competition Council. This record amount was not exceeded until February 2011, when the Competition Council announced the finalisation of its investigation into mobile telephone operators Orange and Vodafone for abuses of dominant positions and the imposition of fines equivalent to €34 million and €28 million respectively.

CNPR has lodged an appeal against the Competition Council's decision with the authority responsible for administrative disputes.

www.consiliulconcurentei.ro

[RUA] [AIH]

United Kingdom

European Convention on Human Rights – Right to a fair trial – Defendants subject to the freeze of funds pursuant to Council Regulation (EC) No 881/2002 - Interpretation of "challenges to civil rights and obligations" within the meaning of Article 6 of the Convention

In its judgment of 13 April 2010, the Court of Appeal heard the appeal brought by the Secretary of State for the Foreign Office and Commonwealth Affairs against a High Court judgment, in which the High Court found that, via its effects, the decision to include the defendants on a list of individuals linked to terrorist activities had infringed the rights of the

said defendants as guaranteed by Article 6 of the European Convention on Human Rights (hereafter referred to as "the Convention"). The Court of Appeal ruled that, even if the ruling in question could be subject to appeal, the said appeal would have to target the creation of the administrative decision, not its effects, since Article 6 of the Convention could not be invoked in respect of the effects. According to the Court of Appeal, in order to determine whether the impact of a decision on the rights of an individual concerns the civil rights of that individual within the meaning of the Convention, the focus should be on the nature and purpose of the administrative decision in question, not on its effects.

In the dispute in the main proceedings, the two defendants, both of Libyan origin, were included on the list of individuals suspected of having links with Al-Qaeda, Osama bin Laden or the Taliban, at the initiative of the United Kingdom government. The inclusion of the defendants on the said list had been ordered by an Order in Council. Pursuant to the Ahmed decision, the situation of the defendants was governed by Regulation (EC) No 881/2002. The defendants contested the legality of several administrative decisions of the Foreign and Commonwealth Office, including the decision to include them on the list and the refusal to remove their names from the list.

In this context, the High Court had been seised with the existing issue of knowing whether the dispute actually concerned the civil rights and obligations of the defendants pursuant to Article 6 of the Convention. Before that court, the Secretary of State maintained that the conditions relating to a fair trial set out in Article 6 of the Convention were more stringent that those provided for by common law. Although the three judges had expressed doubts on this subject, maintaining that resolving this issue would have no impact on the dispute in the main proceedings, they had taken into consideration the argument of the Secretary of State and had also deemed that the dispute could concern the defendants' civil rights and obligations. According to the High Court, although the decisions had taken the form of an administrative decision, on the substance, these decisions infringed the civil rights of the individuals.

The Court of Appeal quashed this judgment. Lord Justice Sedley noted that the European Court of Human Rights does not make the above-mentioned distinction and instead emphasises the nature of that administrative power. Consequently, adopting and maintaining a measure to freeze funds both constitute an administrative decision, and the fact that the measure in question had a dramatic impact on the rights of the individual does not necessarily imply that the dispute concerns civil rights and obligations within the meaning of Article 6 of the Convention.

Court of Appeal (Civil Division), judgment of 13 April 2011, Maftah and another v Secretary of State for the Foreign Office and Commonwealth Affairs, [2011] EWCA Civ 350, www.bailii.org

IA/32648-A

[OKM] [SMITHSA]

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Free movement of persons – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States - Directive 2004/38 – Right of residence derived from Article 12(3) of the directive – Right of residence making it possible to acquire a permanent right of residence –Absence

In a judgment dated 20 April 2011, the Court of Appeal (Civil Division) found that Article 12(3) of Directive 2004/38 on the Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereafter referred to as "the Directive") cannot provide citizens of the Union or citizens of a third country a means to acquire a permanent right of residence in the United Kingdom. The Court of Appeal was asked to rule on an appeal brought by a father and his two children against a judgment by lower courts (the immigration tribunals) confirming the UK Border Agency's refusal to grant them a permanent right of residence.

The first appellant (hereafter referred to as "the father") is a citizen of Nigeria. In 1994, he married a Dutch citizen and the couple had two

children (the second and third appellants). The children were born in Germany and were, consequently, citizens of the Union. In 2001, the family arrived in the United Kingdom and, in 2003, the family members obtained a right of residence, the mother under Article 7(1) of the Directive and the father and children under Article 7(2) of the Directive. Under Article 10 of the Directive, the father and children received a residence permit valid for five years. At the time of her death in 2007, the mother did not meet the conditions set out in Article 7(1) of the Directive. The appellants' residence permits expired on 26 June 2008.

As the children (in the custody of their father) were enrolled in school, the Court of Appeal agreed that the appellants could have a right of residence under Article 12(3) of the Directive. However, the appellants maintained that the right of residence under that article included a right of permanent residence, or that the right of residence granted by Article 4(3) of the Directive could serve as a basis for acquiring a permanent right of residence under Article 16 of the Directive, according to which "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Accordingly, according to their argument, Article 12(3) of the Directive made their presence on the territory of the United Kingdom legal, in accordance with Article 16, and, consequently, after a period of five years they had acquired permanent right of residence.

In rejecting this argument, the Court emphasised the difference in wording between the first two paragraphs of Article 12, which refers to a "right of permanent residence" and the third paragraph, which states that "the Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children". According to the court, Article 12(3) of the Directive alone cannot provide right of permanent residence. In addition, the right of residence provided by this article cannot give rise to a right of permanent residence via Article 16. The reasoning of the court states that the directive as a whole must be considered. The means via which individuals finding themselves in the same situation as the appellants can obtain a right of permanent residence are set out in Article 12 of the Directive.

Court of Appeal (Civil Division), judgment of 20 April 11, Okafor and others v Secretary of State for the Home Department, [2011] EWCA Civ 499, www.bailii.org

IA/32649-A

[OKM] [SMITHSA]

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Citizenship of the Union – Electoral rights – Denial of voting rights imposed on prisoners – Impossibility of basing voting rights for Union citizens domiciled in their own Member States on Article 20(2)(b) TFEU

In its judgment dated 8 April 2011, the Outer House of the Court of Session denied the appeal lodged by a prisoner against a decision by an official responsible for the electoral rolls refusing to register him on the local council's electoral rolls, resulting in his being deprived of his right to vote.

This decision dovetails with a controversial issue in the United Kingdom concerning voting rights for prisoners, based on a judgment by the European Court of Human Rights (ECHR) (Hirst v. United Kingdom), pursuant to which the British government did not adopt measures to modify the situation of prisoners. The appellant had, instead of invoking the rights arising under the Convention, opted to challenge the Representation of the People Act 1983, maintaining that the said Act violated voting rights arising under EU law.

In the case in question, the Court of Session denied the appeal due to the existence of a right to compensation under the 1983 Act which constituted an effective alternative means of remedy. However, the court examined the validity of the appellant's claims regarding the scope of Article 20(2)(b) TFEU.

In this respect, the appellant maintained that he

was an EU citizen, despite his incarceration. He maintained that, with regard to the voting rights of an EU citizen residing in a Member State of which he is not a citizen, Article 22 TFEU had existed since the Maastricht Treaty, but that, on the other hand, Article 20(2)(b) TFEU had no equivalent in previous treaties. That article states that EU citizens enjoy, among other things, the "right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State". According to the appellant, this provision is not limited to EU citizens residing in a Member State of which they are not a citizen. Article 20(2)(b) TFEU does not constitute a reproduction of Article 22 TFEU and thus created different rights. Specifically, this provision can create voting rights for EU citizens who are citizens of Member States in which they reside, Article 20(2)(b) TFEU would therefore have a scope broader than that of Article 22 TFEU.

Moreover, the appellant referred to the reasoning of the European Court of Justice in its judgment of 8 March 2011 (Ruiz Zambrano, C-34/09, not yet published), in which the Court found that "citizenship of the Union is destined to be the fundamental status of nationals of Member States".

The court dismissed this argument. According to the Court of Session, the words "under the same conditions as nationals of that State" clearly distinguish two different situations. The first part of the phrase concerns nationals of another Member State because, if it was otherwise, the comparison explicit in the words "under the same conditions" could not be made. According to the Outer House of the Court of Session, the Zambrano judgment showed that the rights of a European citizen can, under certain circumstances, be applicable without the need to demonstrate a cross-border element. However, the situation in the case in question was different, given that the right arising with European citizenship was clearly a right granted solely to individuals residing in a Member State of which they are not a national. The court reached this conclusion without being presented with reservations that would have necessitated a reference for a preliminary ruling to the European Court of Justice.

Outer House, Court of Session, judgment of 8 April 2011, George McGeogh, [2011] CSOH 65, www.bailii.org

IA/32647-A

[OKM] [SMITHSA]

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Court martial – Majority judgment – Sentence compatible with Article 6 of the Convention

The judgment of the Courts-Martial Appeals Court dated 21 December 2010 in the case R. v Twaite states that a majority judgment is not incompatible with Article 6 of the Convention. The Courts-Martial Appeals Court ruled accordingly pursuant to a referral by the Judge Advocate General pursuant to the sentencing of a defendant by a court martial.

The defendant, a captain in the Royal Air Force, was found guilty of fraud under Article 2 of the Fraud Act 2006. The pleadings were made before a Judge Advocate and a chamber of five non-specialist members. During the sentencing hearing, and following a question put by the judge advocate, the chairman of the chamber stated that the sentencing decision was made by a majority (four votes to one). The judge advocate had expressed reservations regarding the fact that the chamber may have erred in law. Consequently, the chamber referred the judgment to the judge advocate general, who then referred it to the Courts-Martial Appeals Court. It raised some questions of law, including the legality of a majority judgment handed down under Article 160(1) of the Armed Forces Act and, in particular, the compatibility of such a judgment with Article 6 of the Convention.

The Courts-Martial Appeals Court ruled that majority judgments do not infringe the right to a fair trial within the meaning of Article 6 of the Convention. Indeed, on the one hand, the court emphasised the fact that the former national legislation (*inter alia* the Air Force Act 1955) had already been examined by the Strasbourg Court and the House of Lords. However, these courts had examined other criticisms not related

to the question of the legality of majority judgments, as the latter criticism was not tackled. Accordingly, the Armed Forces Act 2006 made no changes in this regard.

In addition, the court emphasised that the use of majority judgments is not limited to military proceedings. They are also used in magistrates' courts and appeals lodged with the Crown Court against judgments by the magistrates' courts. Moreover, the use of majority judgments handed down by a jury does not lead to any reservations about the justice of a judgment. Hence, according to the court, there is no reason to conclude that a finding of guilt, made by a majority, is intrinsically unjust or that there is a risk regarding legal certainty if, after being found guilty, the defendant was likely to be sentenced to a substantial period of imprisonment.

Courts-Martial Appeals Court, judgment of 21 December 2010, R. v Twaite, [2010] EWCA Crim 2973, www.bailii.org

IA/32645-A

[OKM] [SMITHSA]

Slovakia

European Union resources – Protection of the Union's financial interests – Fight against fraud – On-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests – Protection of information communicated or obtained during an inspection – Prohibition on divulging the aforementioned information to unauthorised persons – Access to inspection results on request - Admissibility

With its judgment of 7 December 2010, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, hereafter referred to as "the Najvyšší súd") ruled on the scope of the protection of professional secrecy as regards information obtained by virtue of Council Regulation (Euratom, EC) no. 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities by interpreting Article 8(1) of the regulation and the provisions of the national law on unrestricted access to information.

In the case in point, a legal person asked the Ministry of Education, Research and Sport for access to the results of the audit performed by the Commission's auditors in 2006, which concerned the use of financial investments granted for a project by the Institute of Advanced Studies (Inštitút pokročilých štúdií). This request was refused on the grounds that the information could only be divulged to authorised individuals, since it was covered by professional secrecy within the meaning of Article 8(1) of Council Regulation (EC, Euratom) no. 2185/96.

The Najvyšší súd upheld the appellant's appeal in the context of proceedings for judicial review of administrative decisions.

In the view of the Najvyšší súd, it is important to draw a distinction between information obtained while performing an inspection, which may not be divulged to unauthorised persons, and information on the result of an inspection, which must be shared upon request. The Najvyšší súd referred to Article 11(1)(g) of law no. 211/2000 on unrestricted access to information, which limits access to information about an inspection apart from information about the result of the inspection. The divulgence of information on inspection results may only be limited by a special law. Furthermore, referring to the wording of Article 8(1) of Council Regulation (EC, Euratom) no. 2185/96, the Najvyšší súd pointed out that the provision did not rule out divulgence of information on the result of an inspection. While it is true that the regulation protects information communicated or acquired during inspections performed by the Commission, this protection does not extend to inspection results.

Najvyšší súd, judgment of 7 December 2010, 3 Sži 2/2010, http://nssr.blox.sk/

IA/33012-A

[HUDAKMA] [VMAG]

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Fiscal provisions – Approximation of laws – Taxes on turnover – Common system of valued-added tax (VAT) – Importing goods – Goods from a third country imported into a Member State – Sale of goods covered by the inward processing system in a customs warehouse without release for free circulation – Charging VAT on the sale – Inadmissibility

In its judgment of 7 December 2010, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, hereafter referred to as "the Najvyšší súd") ruled on the issue of whether VAT was payable on the sale of goods covered by the inward processing system in a customs warehouse if the goods had not been released for free circulation.

In the case in point, a Slovak company (hereafter referred to as "the appellant") appealed against a decision through which the Slovak tax authority (hereafter referred to as "the defendant") charged the appellant certain amounts as VAT for the years 2005 and 2006. During an inspection of the appellant's premises, the defendant had found that an (imports) company had imported semi-finished steel products from Ukraine for the appellant. These goods had been stored in a public customs warehouse, where the appellant carried out processing operations on them.

This shows that after the purchase, the customs warehousing system changed into an inward processing suspension system. The appellant subsequently sold the products it obtained (steel beams) to another Slovak company, which returned them to the customs warehousing system. All of the aforementioned transactions were carried out in the same customs warehouse, which is on Slovak territory.

Given that the appellant did not apply VAT to the sale, the defendant concluded that the appellant had violated the VAT law transposing the Sixth Council Directive 77/388/EEC on the common system of value-added tax. In the defendant's view, the appellant had performed "supply of goods effected for consideration within the territory of the country", so the transaction should have been subject to VAT.

The Najvyšší súd overturned this decision, reasoning that the placement of goods from a third country in a customs warehouse could not be viewed as an import operation performed in Slovakia. It could only be viewed as such if a customs authority removed the goods from the system in which they were placed and released them for free circulation in Slovak territory. Referring to Article 84 of Council Regulation (EC) no. 2913/92 establishing the Community Customs Code, the Najvyšší súd found that goods under the customs warehousing or inward processing suspension systems were not subject to import duties or trade policy measures. Moreover, since there are no fiscal obligations linked to the import of goods, the goods are not covered by the Slovak legal system. The requirement to pay a tax for the supply of goods effected for consideration within the territory of the country cannot precede the requirement to pay a tax for importing the goods, so VAT is not payable when goods are sold in a customs warehouse, providing these goods are subject to the customs warehousing or inward processing system.

Finally, it should be noted that this judgment was handed down before another chamber of the Najvyšší súd referred a preliminary question on the same point of law to the European Court of Justice (case C-165/11).

Najvyšší súd, judgment of 7 December 2010, 3Sžf 27/2010, http://nssr.blox.sk/

IA/33011-A

[HUDAKMA] [VMAG]

Sweden

Freedom to provide services – Posting of workers as part of service provision – Directive 96/71/EC of the European Parliament and of the Council – Damages payable following a violation of EU law – Application for general and pecuniary damages – Application for review - Refusal

Following the European Court of Justice's judgment of 18 December 2007, (Laval un

Partneri Ltd., C-341/05, ECR p. I-11767), the Labour Court (hereafter referred to as "the Arbetsdomstolen") handed down a judgment on 19 December 2009. This final judgment, which cannot be appealed, was contested by the trade unions before the Supreme Court (hereafter referred to as "the Högsta domstolen") through an application for review (*resning*) and a complaint about a procedural defect (*klagan över domvilla*), two extraordinary legal remedies. This application to the Högsta domstolen was refused, and the two judgments are summarised below.

In its judgment on case C-341/05, the European Court of Justice found that Swedish law restricted freedom to provide services and breached Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services. The Arbetsdomstolen began by refusing the appellant's declaratory application, which aimed to obtain a decision stating that collective actions by trade union organisations were inadmissible and should consequently be dismissed. The court justified its refusal by highlighting that following the ECJ's judgment, the trade union organisations recognised that their actions were inadmissible in light of Community law and agreed to undertake no more collective actions, without specifying any particular form.

The Arbetsdomstolen then resolved the matter of damages payable as a result of the inadmissible collective actions undertaken by the trade unions, basing its approach on the fact that the class actions were deemed inadmissible by the European Court of Justice. With regard to the first argument, namely that the collective actions aimed to force the service provider to sign a collective agreement requiring it to abandon its monthly salary system in favour of a performance-based salary system, the Arbetsdomstolen found that the trade union organisations had committed a violation of Article 49 EC (now Article 56 TFEU) in respect of the service provider given the direct, horizontal effect of that provision on trade union organisations and, through them, on the service provider. The Arbetsdomstolen found that payment of damages was the necessary consequence of these actions. The Co-Determination Act (Lag (1976:580) om medbestämmande i arbetslivet, hereafter referred to as "the MBL") contains rules on the liability of trade union organisations and employers' organisations in cases where collective actions are undertaken contrary to the compulsory social truce. In the view of the Arbetsdomstolen, these provisions could be applied, by analogy, to the situation at hand.

The second argument related to the attempt to force the service provider to abide by a certain collective agreement whereas the service provider was already bound by a collective agreement in its own Member State. The MBL allows such collective action. The Arbetsdomstolen ruled that this provision was discriminatory and contravened the EC Treaty and, as such, was not applicable. This inapplicability makes collective actions inadmissible and means that the rules on damages apply.

The MBL provides for two categories of damages: pecuniary damages, which aim to compensate material losses, and general damages. This second category of damages could be viewed as equivalent to non-material damages. Although there could be no doubt that the appellant had suffered material losses, the Arbetsdomstolen refused the appellant's application for pecuniary damages on the grounds that the appellant had not shown the extent and amount of the loss. However, the Arbetsdomstolen ordered two trade union organisations to pay SEK 200,000 and a third to pay SEK 150,000 in respect of general damages.

The Arbetsdomstolen is the court of last instance in cases on labour law, so its judgments are always final. The trade union organisations believed that its decision following the Laval un Partneri Ltd. case was illegal and that proceedings before the court were vitiated by procedural defects. They therefore asked to be given recourse extraordinary legal remedies, namely review (*resning*) and complaint about procedural defects (*klagan över domvilla*), before the Högsta domstolen. These remedies involve reopening a case that was closed following a binding decision (*resning*) or cassation of a binding judgment (*klagan över domvilla*). The existence of exceptional circumstances is a

prerequisite for the exceptional legal remedy *resning* to be granted. Under Chapter 58, Article 1(1)(4) of the Code of Procedure (Rättegångsbalk, given Särö den 18 junli 1942, hereafter referred to as "the RB"), review (*resning*) may be granted to any party as long as that party can prove that application of the law on which the contested judgment was based clearly violated the law. Chapter 59, Article 1(1)(4) of the RB stipulates that the contested judgment may be overturned in cassation if there was a serious procedural defect that could have affected the outcome of the case. In their combined application for revision (*resning*) and complaint about a procedural defect (*klagan över domvilla*), the trade union organisations argued that the Arbetsdomstolen's application of the law went against the law itself and that the proceedings were vitiated by several procedural defects that affected the outcome of the case. They put forward ten points to support their argument, including the following: that the Arbetsdomstolen's evaluation of the applicable law was seriously erroneous, principally because of the lack of a legal basis for a direct horizontal effect after violation of Article 49 EC as regards damages and for the right to compensation, and also because the Arbetsdomstolen had treated private entities and the Swedish State in the same way and that the private entities were obliged to pay compensation retroactively; that the Arbetsdomstolen had made a seriously erroneous assessment as regards the clear violation of Community law by the trade union organisations; that the Arbetsdomstolen has applied the Swedish law in a seriously erroneous way that went against the wording of the law; and that the Arbetsdomstolen had made a seriously erroneous assessment by not requiring the trade union organisations to be recognised as negligent, while ordering them to pay damages.

The Högsta domstolen briefly explained that the Arbetsdomstolen had given a detailed presentation of the provisions and principles applying to the case, including Community case law, when it made its judgment. The Högsta domstolen found that all the evidence showed that the Arbetsdomstolen's application of the relevant law was not illegal, and neither were its assessments. It concluded by stressing that there had been no procedural defects and refused the applications.

Arbetsdomstolen, judgment of 12 December 2009, Dom no. 89/09 (Mål n°A-268-04), and Högsta domstolen, order of 6 July 2010 Mål no. Ö 2181-10, www.domstol.se

QP/05415-P1
QP/05415-P2

[LTB]

Non-EU countries

United States

Competition – Cartels – Inter-company agreements – Fixing prices and conditions for online music distribution

The Supreme Court of the United States was asked to rule on an appeal by the majors (the large companies that dominate the music publishing industry) against a decision by the Second Circuit Court of Appeals. The Supreme Court refused to rule on the lower court's judgment, which concerned the re-establishment of a class action suit against the majors for supposedly fixing prices and the conditions applicable to online music distribution. As usual, the Supreme Court of the United States did not give reasons for its decision.

In the original case, the appellants had brought an action against the majors before the district court (Southern District of New York), arguing that the majors were involved in a cartel to fix the prices of every song sold on the Internet. The majors claimed that the appellants' action was not admissible as they had not proved the existence of a cartel to the requisite legal standard.

The New York district court's decision, which threw out the appellants' arguments, was then overturned by the Second Circuit Court of Appeals, which found that the appellants' evidence provided sufficient proof that there was a cartel.

In its judgment of 13 January 2010, the Second Circuit Court of Appeals found that ongoing

investigations on the majors' practices in this area – two by the Department of Justice (national competition authority) and one by the New York Attorney General – proved, in combination with six other factors, that there was a cartel on the market in question, regardless of the fact that the Department of Justice had not yet reached a decision concerning a possible breach of Article 1 of the Sherman Act.

The Supreme Court's decision not to rule on the case has the effect of sending the case back to the court of first instance (the district court) for it to rule on the substance of the case.

Supreme Court of the United States of America, order of 10 January 2011, Sony Music Entertainment e.a. v. Starr, no. 10-263, www.supremecourt.gov

IA/32650-A

[OKM]

B. Practice of international organisations

[No information was retained for this section.]

C. National legislation

France

France

Opening of the historic nuclear energy supply market

On 7 December 2010, a new act on the organisation of the electricity market (known as the "NOME" law) was passed, amending the law of 10 February 2000 on the modernisation and development of the public electricity service.

The purpose of this new act is to bring the electricity supply system in line with the requirements of EU law by organising the opening of the electricity markets to competition in accordance with Directive 2003/54/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity, the incorrect transposition whereof earned France a reasoned opinion from the European Commission initiating proceedings against that country for failure to fulfil its obligations.

That same year, in a decision on the law on the energy sector (no. 2006-543 DC), the Conseil constitutionnel ruled that maintaining regulated tariffs for the sale of electricity without time limits clearly violated the aim of opening the competitive natural gas and electricity markets set by the relevant Council Directives [nos. 2003/54 and 2003/55]." In June 2007, the European Commission opened an in-depth investigation to determine whether said regulated tariffs applied in France were compatible with the ban on State aid.

The NOME law is intended to put an end to these European proceedings by guaranteeing alternative suppliers a right to access the country's nuclear power generation base, which is historically reserved for Electricité de France (hereafter referred to as "EDF"). It provides for switching from a monopolistic to a competitive system by 2025 by organising a Regulated Access to Historical Nuclear Energy (known by the French acronym ARENH). Pursuant to the provisions of this new act, electricity suppliers authorised to supply nuclear power will be granted a right of regulated access limited to historical nuclear energy, whilst EDF will be required to release capped volumes of historical nuclear energy to them.

In return for this obligation imposed on EDF, the law provides for a new system of regulated prices. Such prices are fixed by the Energy Regulatory Board (hereafter referred to by the French acronym "CRE") for a transitional period running until the end of 2015, during which the competent ministers will retain their powers to set tariffs subsequent to the reasoned opinion of the CRE.

Furthermore, the NOME law reforms the composition of the CRE and confers broad powers on the body, including the power to sanction any violation of the right to regulated access to historical nuclear energy.

Finally, the former system of local taxes

applicable to power supply to end users has been replaced by an excise tax system. There is also a new national tax applicable to consumers who have opted for power exceeding 250 kVA. These reforms did not, however, prevent the European Commission from initiating proceedings against France on 5 April 2011 for failure to take the necessary measures within the stipulated period to adapt the electricity taxation systems to the provisions of Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (Commission v. France, C-164/11)

Loi n° 2010-1488 du 07.12.2010 portant nouvelle organisation du marché de l'éléctricité, JORF n° 0284, 08.12.2010,
www.legifrance.gouv.fr

[VERDIIS]

Ireland

Registered partnership

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 entered into force on 1 January 2011. This act establishes a system of registered partnership for same-sex couples as well as a redress system for cohabiting (same or opposite sex) couples who are not married or registered. For the first time, once registered, same-sex couples will have the same rights and enjoy the same protection as married couples in terms of social security, alimony, inheritance, taxation, property and pensions. Nonetheless, the act elicited criticism because it made no mention of the rights of children of same-sex couples.

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, www.irishstatutebook.ie

[SEN]

Retention of data

The Communications (Retention of Data) Act 2011 entered into force on 26 January 2011. It is intended to transpose Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks. It is worth pointing out that Ireland contested the legality of said directive, citing Article 95 EC, in case C-301/06 (Decision of 10 February 2009, Ireland v. the Parliament and the Council, Rec. p. I-593) and was condemned for failure to transpose the directive by the stipulated deadline.

Communications (Retention of Data) Act 2011, www.irishstatutebook.ie

[SEN]

United Kingdom

Asset-freezing Act

The Terrorist Asset-freezing Act of 2010 was a response to the ruling of the Supreme Court in the case of HM Treasury v. Ahmed. In that case, the Supreme Court had ruled that the use of an Order in Council to implement UN Security Council resolutions was *ultra vires* in regard to the powers granted by the UN Act of 1946. The Supreme Court ruled that the use of Orders in Council was illegal on the grounds that the UN Act made no provision to that effect, and also because the use of such Orders is incompatible with the ruling in the Simms case, according to which Parliament can legislate contrary to fundamental principles of human rights only in clear terms.

The UN Act of 1946 recognises that the executive branch has the power to take such measures as it should deem "necessary or advisable" to get UN resolutions implemented without prior vote in Parliament. The two Orders in Council adopted pursuant to this legislation, which have been contested, were the 2006 Order in Council on terrorism (UN measures) and the Order in Council relating to Al-Qaeda and the Taliban (UN measures), the latter being a transposition of the list of persons and entities concerned by the asset-freezing measures into national law. Pursuant to Article 4 of the first Order in Council, in order to freeze the assets of an individual, the Chancellor of the Exchequer must have reasonable grounds to suspect that the person concerned is or might be a person who has committed, tried to commit, participated in or facilitated the perpetration of a terrorist act. The

majority opinion took the view that the use of the word "suspect" made the Order *ultra vires*, because it gave the Chancellor of the Exchequer broader powers than required by Resolution no. 1373.

Furthermore, the Supreme Court had noted that the absence of a right to a judicial remedy against the 2006 Order in Council on Al Qaeda and the Taliban violated the right to a fair trial. Even though Article 103 of the UN Charter provides that the obligations of the contracting States derived from the Charter take priority over their other international obligations as, in the case at hand, individual rights derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to plead one's case before a court has long been recognised as being essential to legal certainty by common law, and it is not possible to deviate therefrom, except by an explicit legal text.

The Chancellor of the Exchequer had nonetheless initially responded with temporary legislation (in force until 30 December) which re-established the validity of the Orders in Council in question, and subsequently by the bill which became the Terrorist Asset-freezing Act 2010, which is henceforth part of the legislative basis governing the freezing of the assets of terrorists in the United Kingdom.

In reply to concerns expressed by defenders of human rights, this act provides that the Chancellor of the Exchequer can freeze someone's assets only if that person is suspected of having terrorist connections, and only for 30 days maximum. Furthermore, if the Chancellor has reasonable grounds to believe that the person in question is or has been involved in terrorism-related activities, he is empowered to enter that person on the list for an unspecified period.

The act also provided a right to judicial remedy for persons entered on the list, exercisable before the High Court, or the Court of Session in Scotland. If the Chancellor of the Exchequer exercises any other powers granted by the act, the appellant is entitled to file for a judicial review.

In spite of these provisions, human rights groups continue to criticise the act for several reasons. According to a joint report by two such groups (JUSTICE and LIBERTY), the system is flawed because the burden is on the appellant. These groups have stressed that in the current system, it is incumbent upon people suspected of terrorism to initiate an action for annulment of the administrative decision by which they were entered on the list. These groups contend that the Chancellor of the Exchequer should have to justify systematically before the competent court his decision to freeze the assets of an individual. This situation is exacerbated further by the freezing of assets, whereby the appellant has to ask the Chancellor to release funds so that s/he can lodge an appeal against being entered on the list.

Terrorist Asset-Freezing etc. Act 2010, www.legislation.gov.uk/ukpga/2010/38/contents

[OKM] [SMITHSA]

Sweden

Amendment of the relevant legislation as a result of the Laval judgment, C-341/05

As a result of the European Court of Justice judgment in the case of Laval un Partneri Ltd (judgment of 18 December 2007, C-341/05, ECR p. I-11767), the Sveriges riksdag (Swedish Parliament) made three important amendments to the labour law provisions concerning the posting of workers to provide services.

The amendments were intended to preserve the Swedish system, which is characterised by the independence of the parties on the labour market. This independence essentially comprises three elements: a) a balanced management of the labour market by means of collective bargaining agreements and collective actions; b) no legislative measures; c) no measures aimed at making collective bargaining agreements generally applicable.

1. A new provision (Article 5a) was introduced in the Posting of Workers Act (Lagen (1999:678) om utstationering av arbetstagare). This provision governs the right to take collective action in order to resolve the working conditions of a foreign service provider for a worker posted in Sweden. It defines in particular

the conditions under which collective action may be taken. It is worth noting in this connection that the conditions of work and employment required must meet the conditions of a collective bargaining agreement applicable throughout Sweden for the workers in the sector in question. Moreover, only conditions relating to pay and certain other conditions of employment (in particular working time and the entitlement to leave) are concerned. The pertinent trade unions may not require of the service provider better working conditions than the minimum levels provided by the applicable trade union agreement. No collective action may take place if the conditions for the posted worker essentially correspond to at least the minimum conditions provided for in the applicable trade union agreement.

It is the responsibility of the service provider to show that the working conditions correspond to at least the minimum conditions stipulated in the pertinent collective bargaining agreement.

In addition to these amendments, the Office of Work Environment (Arbetsmiljöverket) is required to inform the service provider about the applicable collective bargaining agreements and the conditions contained therein subsequent to the amendment of the act, in order to facilitate the latter's task in finding the pertinent collective agreement, without however representing the service provider nor giving information or interpretations in case of uncertainty.

2. The provision of the Co-determination Act (Lag (1976:580) om medbestämmande i arbetslivet, hereafter referred to as "the MBL") which is part of the "Lex Britannia", was ruled discriminatory by the European Court of Justice and was amended. The "Lex Britannia" comprises three provisions in the MBL, and the provision judged incompatible with Articles 49 and 50 EC (current Articles 56 TFUE and 57 TFUE) made it possible to take collective action against a foreign employer carrying out an activity in Sweden temporarily, when an overall assessment of the situation led to the conclusion that the connection with Sweden was too tenuous for the MBL to be deemed directly applicable to the working conditions in question. The amendments have made collective action taken in violation of the Posting of Workers Act inadmissible. Moreover, pursuant to the new regulations, the trade unions are responsible for collective actions taken against a service provider who posts workers in Sweden, in spite of the fact that the MBL is not directly applicable to such an employment relationship.

3. The Swedish legislator has repealed the rule provided for in Article 5 of the Posting of Workers Act requiring the service provider to apply the Swedish provisions according to which the worker is entitled to be informed, at least two weeks in advance, of changes to the work schedule. This amendment to the rule was necessary because the conditions were deemed not to be part of the core imperative rules of minimum protection provided by Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services.

All the legislative amendments entered into force on 15 April 2010.

Lag (2010:228) om ändring i lagen (1999:678) om utstationering av arbetstagare,
Lag (2010:229) om ändring i lagen (1976:580) om medbstämmande i arbetslivet,
www.riksdagen.se

[LTB]

D. Extracts from legal literature

The European Court of Justice and the procedure concerning disputes regarding access to documents

The European Court of Justice handed down three decisions on the dispute about transparency in the functioning of the institutions in 2010 in the cases of the Commission versus Technische Glaswerke Ilmenau[1], the Commission versus Bavarian Lager[2], and Sweden versus the International Press Association and the Commission[3]. Handed down on appeal by the Grand Chamber, these judgments add "a new chapter to the exciting saga of access to documents […] a hot topic being debated before the courts of the European Union" as well as before the political authorities currently in the process of revising Regulation (EC) no. 1049/2001 of the European Parliament and of the Council[4]. Whereas this case law "can

cause a certain uneasiness among proponents of transparency[5]", in view of the "attenuations to the right of access […] brought about by the Court[6]", the fact remains that the approach selected is perhaps "the only one that […] respects the connection between the general rules of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council and [other] special rules" applicable to access to information in the legal realm of the European Union[7].

In the first of these cases, "the Commission's refusal of a request by a company to access the entire administrative file concerning the procedure of State aid which it had received [afforded] the Court of Justice an opportunity to specify the scope of the exception to the right of access to documents […] provided by Regulation (EC) no. 1049/2001 of the European Parliament and of the Council regarding inspection, investigation and audit activities[8]". Departing clearly from the solution proposed by Advocate-General Kokott in his submissions, "the Court has, by judicial decision, established a general presumption according to which the disclosure of documents pertaining to a procedure for review of State aid in principle violates the objectives of the investigative activities entrusted to the Commission[9]". Whereas the option of an institution receiving a request for access to justify a decision to refuse by relying on general presumptions that apply to certain categories of documents had already been accepted by the Court in its Turco ruling[10], this very first concrete application of this principle is no surprise, "inasmuch as it changes the very nature of the exception provided in Article 4, paragraph 2, third indent of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council. Although it was traditionally required to identify a reasonably foreseeable and not purely hypothetical risk to the protected interest, the TGI judgment henceforth raises this exception to the rank of a block exemption. […] The institution concerned [may] refrain from having to explain in detail the grounds on which the invoked exception applies concretely and effectively to this or that requested document, if it can cite similar considerations of a general nature likely to encompass similar documents. [Whereas] such a general presumption makes the work of the institution in question far easier […] we are not far from exemptions by category, and this may appear to challenge the principle according to which exceptions to the right to access documents should be subject to strict interpretation[11]".

Beyond these general considerations, the application of this solution in procedures for review of State aids, confirmed in the interim by the Court in the case of Ryanair[12] and Navigazione Libera del Golfo[13], "is […] undeniably a breakthrough for the application of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council to 'competition proceedings', the scope of which should be measured[14]." As can be illustrated by the "obvious differences" between this decision and the "two (contemporary) judgments of the Court on merger control handed down in the cases of Odile Jacob[15] and Agrofert[16]", the change of direction from the Court's established case law is clear[17]. "On the practical front […], it is easy to gauge the importance of the general presumption to which the Court refers in the TGI ruling when it is applied to procedures for review of State aids." It makes it possible to preserve "the bilateral nature of the procedure […] by refusing any circumvention thereof by the right to access documents[18]." This is a "solution that seems justified" at this time, given the "existence of special rules of competition law" that govern access to the file. All the more so as it "does not exclude all rights of access, since the applicant could always show that the document is no longer protected, for example, because time has lapsed or […] because its disclosure is justified by an overriding public interest[19]". That said, "the judgment raises […] two series of difficulties[20]."

"If the sole area of review of State aid is considered, the request to access was filed while the […] administrative procedure was still in progress. Is the solution valid once this procedure has been completed? The case can be made that the argument of the breach of the rules specific to Council Regulation (EC) no. 659/1999 is no longer valid," even if it is true that "this temporal element is nowhere explicitly stated in the recitals of the judgment[21]." Actually, "prolonging the need to protect the Commission's investigative activities in aids beyond the time necessary to

conclude the investigation […] would be tantamount […] to depriving the public of any opportunity to ascertain that the Commission has met the objectives of said investigation, i.e. of examining and, where necessary, removing any distortion of competition owing to an aid measure that is incompatible with the internal market[22]." Furthermore, "the existence of presumption is recognised as regards the protection of investigative activities. Another question: can equivalent presumption be accepted when other exceptions are invoked? Furthermore, can the solution for review of State aids be adapted to other competition procedures? […] Specificity can be invoked against the extension […] in competition law, particularly in competition litigation, of the procedure for review of State aids [and] the fact that Article 88(2) EC, is often presented as easy recourse to legal redress. It is possible to add that the solution which departs from the principle […] of access enshrined by Regulation (EC) no. 1049/2001 of the European Parliament and of the Council, must itself be subject to strict interpretation. Conversely, the arguments which justify […] [the] Court's position […] are equally valid for other competition procedures[23]." This in any event is the solution opted for by the European Ombudsman in a decision of 2 July 2010[24].

"[Indeed,] the European Ombudsman followed the same approach in a decision on a complaint concerning a request for access to a Commission's preliminary assessment in the context of an investigation concerning the German energy supplier E.ON […]. The Ombudsman ruled that the reasoning of the Court of Justice concerning State aids in the TGI judgment was also valid for an ongoing antitrust investigation[25]."

It is certainly no coincidence that the TGI judgment was handed down the same day as the Bavarian Lager judgment concerning the interpretation of the exception to the right of access enshrined in Article 4(1)(b) of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. The approach followed by the Court in the latter regulation was inspired by the aim to reconcile the application of said regulation with that of other rules that have an impact on the access to information, here Regulation (EC) no. 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data. "In aiming […] to protect privacy […] over the principle of transparency[26]," the Bavarian Lager judgment will moreover catch the attention of all those interested in the public's access to documents[27]."

"It is worth recalling that the judgment handed down by the court of first instance[28], adopted a very favourable stance to access to documents, at the risk of compromising the protection of privacy and personal data[29]. Whereas the Court had limited the application of the exception provided under Article 4(1)(b) of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council to situations where an individual's privacy or integrity would be violated within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights without taking into account the legislation of the European Union on data protection […], in particular Regulation (EC) no. 45/2001 of the European Parliament and of the Council […], the Court challenges this position[30]. "Mirror[ing] the approach taken […] in the TGI judgment […] the Court […] clarified that the specificities of the Data Protection Regulation have to be respected when access to a document including personal data is requested via the Transparency Regulation [▪ . Where a public access request is made to documents including personal data, the provisions of the Data Protection Regulation become applicable in their entirety, including the provision requiring the recipient of personal data to establish the need for their disclosure and the provision which confers on the data subject the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her[31]."

Inasmuch as "it gives priority to the need to preserve the identity of natural persons over the general principle of public access to documents[32]," the judgment unquestionably constitutes very significant progress as regards

"the importance of the level of protection that EU law […] [should] provide as regards the dissemination of personal data under a procedure for access to data held by institutions[33]." Whereas the Court's interpretation "reflects a determination to empower EU data protection law with regard to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the case law relating thereto […] we can only endorse such an approach which asserts the protection of privacy in a society that with time is approaching the fictitious society imagined by George Orwell in 1984, even if it comes at the price of sacrificing the transparency principle[34]."

The Court's concern about ensuring appropriate coordination between the right of the public to access documents, arising out of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council and other specific rules of EU law concerning access to information, is finally also reflected "in the decision handed down in the API case, whereby in line with the TGI judgment, the Court […] enshrines the existence of a general presumption [of confidentiality] covering the pleadings lodged in pending court proceedings[35]." "API [▪ is an interesting illustration of the tension between the conflicting interests of promoting transparency and of protecting the integrity of judicial proceedings. It resolves some of that tension by drawing a clear boundary as to when submissions lodged before the European Courts will be protected from disclosure to third parties[36]". "The judgment […] marks the completion of a judicial sequence where, in two years in the case at hand, the Grand Chamber of the Court was called upon to rule on the character – by nature confidential or public – of documents held by the institutions and used for a legislative, administrative or jurisdictional procedure […]. [It] is remarkable inasmuch as it establishes a general presumption of confidentiality of pleadings lodged by the institution for as long as the case is sub judice, without seeming to have to draw a distinction depending on the – direct or indirect – nature of the court referred to[37]". The Court takes a great deal of care to rule on the exception invoked […] [because] this matter affects its own activity directly[38]. Its decision raises a certain number of questions nonetheless.

First, whereas the Court's reasoning is based mainly on the principle of equality of arms, this principle, "at least as it is understood in the case law of the European Court of Justice, does not require that all parties are treated strictly in the same way, but is only against one party being put in a situation of clear disadvantage in relation to its opponent. It is [actually] doubtful that, owing to the disclosure of its procedural documents, an institution would suffer from such a procedural handicap irrespective of the content of the documents in question, the object of the dispute or the ambient political context[39]." This result is all the more worrying as, "for the parties concerned […] [the] presumption means the reversal of the burden of proof to their detriment ….]. [More specifically], whereas pursuant to Regulation (EC) no. 1049/2001 of the European Parliament and of the Council, the principle of access to documents entails that it is up to the institutions to show that a refusal is justified, in the case of such a general presumption, it is up to the party concerned to show the opposite, which will very often prove particularly delicate[40]." Furthermore, the argument to the effect that the presumption of confidentiality of documents is justified owing to "specific rules governing the procedure […] is not fully convincing. The aim of having the public's right to transparency enshrined is actually distinct from the goals pursued by the aforementioned rules. Moreover, the parties required to make such a disclosure are not the same. The statute of the Court requires it to communicate the documents of the proceedings to each of the parties, without, in theory, prohibiting said parties from disclosing them to other people. There is consequently no contradiction with Regulation (EC) no. 1049/2001 of the European Parliament and of the Council requiring, in principle, another institution – in the case at hand, the Commission – to disclose the same document to third parties[41]."

Then, whereas the EU Court "also indicated that the pleadings lodged by the Commission would contribute further to the Court's activity […] excluded from the right to transparency […] as well as to the Commission's administrative activity […], it is not clear what such reasoning tries to demonstrate. If these documents fall more under the Court's jurisdictional activity,

shouldn't they have been excluded from the scope of application of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council, contrary to previous case law? It would perhaps have been preferable to follow the arguments of Advocate-General Poiares Maduro who argued that "only the Court […] could have […] ruled on […] access to the Commission's pleadings […]. It is actually worth wondering […], along with the advocate general […], whether it is up to an institution other than the Court – which moreover is part of the case – to decide which measures have to be taken to ensure a dispassionate conduct of the proceedings[42]"

Finally, as to the assessment of whether there is "an overriding public interest likely to justify disclosure […] even when it infringes the protection of court proceedings […] the decision is a clear climb down from the benevolent assessment of the interest of transparency shown by the Court in its Turco ruling[43] - not because of the fact that the Grand Chamber refuses to enshrine an obligation of principle to disclose documents relating to a jurisdictional activity. Broached already with the [TGI] ruling […] the specific nature of the legislative activity in relation to the administrative and jurisdictional activities, clearly confirmed in the [API] judgment […], may actually justify a difference of approach in this regard. The way in which the Court understands how a balance is to be struck between interests protected by the exception relating to jurisdictional activities, and the public interest in the disclosure of documents is more surprising, however, as it implies that it is ready to grant the exception value that is no longer relative, but absolute, when it concerns documents relating to proceedings that are pending […]. It is difficult to see what would justify such a reading contra legem of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council, other than a concern to interpret it in accordance with a rule of primary law that the Court has nonetheless failed to identify […] The laconic reasoning and general scope of the solution opted for by the Court can only come as a surprise […]. Pursuant to Article 10 of the European Convention enshrining the right to access certain documents in the general interest […], stating that the concern to inform the public on issues that are clearly in the general interest is too general a consideration to weigh in the interests at stake[44]."

In the end, although they "put a stop – not to say mark a significant turnaround – to the Court's case law on access to documents[45]," the decisions in the cases of TGI, Bavarian Lager and API can be explained by the EU Court's concern to strike the right balance between the public's right to access documents and other pertinent rules concerning access to information, making all three cases fall under the same rationale. More specifically, as one commentator has aptly put it: "[t]his recent case law of the Court of Justice clarifies that the provisions of the Transparency Regulation have to be interpreted in the light of other EU rules including competition procedural rules on access to the file in State aid cases, data protection rules, the Statute of the Court of Justice, and the Rules of Procedure of the EU Courts. Even though the Court of Justice never explicitly stated that those rules would constitute a lex specialis derogating from the general Transparency Regulation, the message seems to be that the [latter] must be applied so as not to deprive these other pieces of legislation of their 'effet utile'. It remains to be seen whether the Court will confirm this case law in [other] cases [▪ . The future rulings [▪ on appeal of the General Court judgments in MyTravel[46], Editions Jacob[47] and Agrofert Holdings[48] should help to clarify this question[49]". It will undoubtedly also afford the Court an opportunity to reply to the criticism this case law has elicited.

(see notes on page 61)

[PC]

E. Brief summaries

* *European Court of Human Rights:* On 1 February 2011, the European Court of Human Rights handed down a judgment in a case concerning a child brought to Portugal by its Portuguese parent, whose German parent petitioned to have it return to Germany. The appellant (the child's mother) cited a violation of her right to respect for family life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

(hereafter referred to as the "Convention")) by the Portuguese authorities. Owing to the excessively long proceedings before the competent court in Portugal, before referring the case to the European Court of Human Rights, the appellant had lodged a complaint with the European Commission for violation of Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The facts and grievances being nearly identical, the case raised the question as to whether the complaint lodged previously with the Commission made the petition before the European Court of Human Rights inadmissible on the grounds that this petition had already been "submitted to another procedure of international investigation or settlement" (Article 35, paragraph 2, b) of the Convention). The European Court of Human Rights accordingly indicated that the term "another procedure of international investigation or settlement" referred to a judicial or semi-judicial procedure similar to that provided by the Convention. The sole purpose of the procedure initiated before the Commission, however, is to obtain voluntary compliance by the Member State concerned with the requirements of EU law. Furthermore, the Commission has the discretionary power to initiate infringement proceedings and a ruling by the European Court of Justice entailing a declaration of failure to fulfil obligations has no effect on the appellant's rights. The ECHR consequently ruled that the Commission is not a body of international investigation within the meaning of Article 35 of the Convention when it rules on a complaint lodged by a private individual. The petition was therefore admissible.
Examining on the merits of the case, the ECHR ruled that Article 8 of the Convention had been violated because the Portuguese authorities did not deploy efficient means to expedite the proceedings at issue, thereby causing an increasing detachment between the appellant and her child.

European Court of Human Rights, judgment of 1 February 2011, Karoussiotis vs. Portugal, (petition no. 23205/08), www.echr.coe.int/echr

IA/32843-A

[TLA]

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On 20 January 2011, the European Court of Human Rights handed down a Chamber judgment in the case of Payet v. France, in which it examined two aspects of the conditions under which the appellant was currently serving a thirty-year prison sentence for the murder of a security guard, a seven-year sentence for escape, and a ten-year sentence for having organised the escape of some of his accomplices.

The appellant's grievances pertained to the "security rotations," i.e. repeated transfers from one prison to the other, to which he was subjected. The European Court of Human Rights rejected the grievances in that respect based on Articles 3, 6 and 8 of the Convention. In view of the appellant's profile, dangerousness and past, the Court considered that such transfers were justified by the risks of escape and were not tantamount to inhuman treatment. It moreover noted that the transfers did not prevent the appellant from communicating freely and confidentially with his counsel or his family and consequently, Article 6(3c), and Article 8 were not violated. It also pointed out that in view of Article 5 of the Convention, every regular detention entails, by definition, a restriction to privacy and family life.

The appellant had moreover complained about a disciplinary sanction imposed on him. The ECHR ruled that the conditions under which the appellant was held in a disciplinary cell that lacked vital space and was moreover very run-down and dirty, with insufficient lighting and ventilation, were of such nature as to cause both mental and physical distress, as well as a feeling of profound affront to his human dignity. These conditions were consequently summarised as "inhuman and degrading treatment" inflicted in violation of Article 3 of the Convention.

On the issue as to whether the disciplinary sanction, and in particular the disciplinary cell, fell under the criminal dimension of Article 6(1) of the Convention, the ECHR ruled that the nature of the charges as well as the nature and degree of seriousness of the sanction were not such as to conclude that the appellant had been

guilty of criminal accusations within the meaning of Article 6, and that said article could not consequently apply to the disciplinary procedure at issue.

Finally, the ECHR noted a violation of Article 13 of the Convention, given the fact that the appeal against the enforcement of the disciplinary sanction is not suspensive, whereas the sanction of incarceration in a disciplinary cell is generally enforceable immediately. Such an appeal, under which the appellant's grievances cannot be examined before the expiry of the disciplinary sanction, is consequently neither appropriate nor effective.

European Court of Human Rights, judgment of 20 January 2011, Payet v. France (application no. 19606/08), www.echr.coe.int

IA/32844-A

[CHIONEL]

* *International Criminal Court*: The Security Council has referred the situation in Libya to the International Criminal Court (hereafter referred as "the ICC") under Resolution no. 1970 adopted on 26 February 2011. After a preliminary examination of the situation in Libya, the office of the prosecutor decided to open an investigation. On 16 May 2011, the prosecutor brought proceedings before the judges of the ICC to issue warrants for the arrest of Muammar Abu Minya Gaddafi, Saif Al Islam Gaddafi, and the head of military intelligence, Abdullah Al Sanusi, for crimes against humanity committed in Libya since February 2011. The three arrest warrants were issued on 27 June.

International Criminal Court, ICC-01/11, Situation in Libyan Arab Jamahiriya, www.icc-cpi.int

[SEN]

* *International Court of Justice:* By its order of 5 April 2011, the International Court of Justice (hereafter referred to as "the ICJ") placed on record the discontinuance by Belgium of proceedings against Switzerland concerning the refusal of a Swiss court to recognise a decision handed down by Belgian courts in violation – according to Belgium – of Switzerland's obligations by virtue of the Lugano EC-EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (see *Reflets no. 1/2010*, p. 35). The case was consequently removed from the register of the ICJ.

Belgium's decision to discontinue the proceedings followed a statement by Switzerland in its preliminary objections to the effect that the decision of the Swiss federal court that had refused to recognise a decision by a Belgian court which had led to the dispute between the countries has not acquired the force of res judicata and consequently is not binding for the lower cantonal authorities of Switzerland nor the federal court itself. It follows, from the same statement, "that nothing stands in the way of a Belgian decision, once delivered, being recognised in Switzerland in accordance with the applicable provisions of the Convention".

International Court of Justice, order of 5 April 2011, Belgium v. Switzerland, www.icj-cij.org

[RA]

* *Brazil:* On 5 May 2011, the Supreme Court of Brazil recognised civil union for same-sex couples. In Brazil, civil union grants practically the same rights as marriage. The decision was adopted unanimously by the ten judges in spite of strong opposition from the Catholic Church. Brazil has not legalised same-sex marriage, however, which in Latin America is permitted only in Argentina and Mexico.

www2.stf.jus.br/portalStfInternacional/cms/verPrincipal.php?idioma=en_us

[SEN]

* *Germany*: The Bundesverwaltungsgericht (Federal Administrative Court), recently proceeded to reverse its established case law by ruling that civil servants living in life partnership are, like their married colleagues, entitled to a family allowance (Familienzuschlag). In its current version, the German Civil Service Remuneration Act (Bundesbesoldungsgesetz) draws a distinction in fact between married civil servants, who are entitled to extra pay simply because of their marital status, and civil

servants living in life partnerships, who are entitled to this benefit only if their partner is a dependent.

The two judgments of 28 October 2010 follow the decision of the Bundesverfassungsgericht (Federal Constitutional Court), of 7 July 2009, which had specified that society had changed and that the traditional image of a married couple where the male spouse exercising an occupational activity to provide for the other (Versorgerehe) can no longer serve to justify according different treatment to the situation of spouses and life partners (see *Reflets no. 1/2010,* p. 5).

The Bundesverwaltungsgericht, being bound by the assessment of the Bundesverfassungsgericht, consequently applies Council Directive 2000/78/EC establishing general framework for equal treatment in employment and occupation directly to the case at hand, and notes that, in its current version, the German Civil Service Remuneration Act discriminates against civil servants living in life partnership, inasmuch as the latter do not receive the family allowance because of their status, whereas married civil servants do. This is discrimination based on sexual orientation, because, according to the intentions of the German legislator, life partnership is geared primarily towards same-sex couples.

Civil servants living in life partnership are consequently entitled to the family allowance as of July 2009, the month in which the Bundesverfassungsgericht accepted that married persons and those living in life partnership were in a comparable situation. The appeal was rejected in that the civil servant had asked to receive the family allowance as of 2 December 2003, a date by which the transposal period for Council Directive 2000/78/EC had expired.

Bundesverwaltungsgericht, judgment of 28 October 2010, 2 C 10.09 and 2 C21.09, www.bverwg.de

IA/33208-A

[AGT]

* *Belgium*: In its judgment of 27 January 2011 the Cour constitutionnelle/Grondwettelijk Hof, responding to a referral for a preliminary ruling, ruled that the different treatment introduced by Articles 40 to 47 of the Act of 15 December 1980 on access to the territory, stay, establishment and deportation of aliens (hereafter referred to as the "Aliens Act") between applicants for family reunion with EU nationals and applicants for such a reunion with a national of a third country authorised to stay in Belgium violated the principles of equal treatment and non-discrimination.

More specifically, this act provided that a foreign applicant for family reunion with a citizen of a third country authorised to stay in Belgium was admitted with the right to stay if the authorities failed to reply within nine months, whereas a foreign applicant for family reunion with a Belgian or an EU citizen was not granted this automatic authorisation, whereby the act imposed no time limit within which the authorities had to take a decision, and stipulated no consequences if such a decision were not taken within the stipulated period.

The Cour constitutionnelle/Grondwettelijk Hof reiterated that the legislator is bound by European law, including Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family to move and reside freely within the territory of the Member States, which requires Member States to provide regulations consistent with other provisions of the Aliens Act. The Belgian Aliens Act moreover stipulates that the more favourable provisions contained in European regulations shall apply to the family members of the EU citizen. Directive 2004/38/EC of the European Parliament and of the Council provides for a period of six months following the filing of an application for family reunion by a family member of an EU citizen who is an a national of an EU Member State, at the expiry of which the residence card is issued.

Cour constitutionnelle/Grondwettelijk Hof, judgment of 27 January 2011, n. 12/2011, www.const-court.be

IA/33127-A

[MEURENA]

* *France*: In its decision of 15 November 2010,

the Conseil d'État laid down the conditions under which work experience acquired in a first State, which was not yet a member of the European Union, can be taken into account for the classification of a civil servant in his professional body.

The applicant, a Polish national, is a civil servant in France. He was initially employed as a university lecturer and then appointed senior lecturer. When Poland joined the European Union, he wished to avail himself of nine years of professional experience he had acquired in Poland.

According to the Conseil d'État, when the statute of a professional body provides that professional experience acquired previously is to be taken into account for classification purposes in that body, it must be "for services of the same nature rendered by nationals of a new Member State, prior to the accession of that State." Conversely, "this principle does not entail challenging a classification prior to accession, which was governed by provisions relating to individuals appointed in that body, who had already acquired permanent status, irrespective of their origin – said classification being the only one taken into account for the treatment accorded to the parties concerned in their former professional body.

Accordingly, the refusal of the Minister for Higher Education to reclassify the person concerned through a review of his situation is not contrary to EU law, in particular to Article 39 EC on the free movement of workers and to Article 7 of Council Regulation (EC) no. 1612/68 on the free movement of workers in the Community.

Conseil d'État, 15 November 2010, no. 332218, www.legifrance.gouv.fr

IA/32937-A

[MHD]

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In its judgment of 8 February 2011, the Criminal Chamber of the Cour de cassation specified the contents of the verifications required to execute a European arrest warrant.

In the case at hand, the office of the prosecutor in Vienna, Austria, had issued a European arrest warrant for the enforcement of a prison sentence for fraud and for participation in a criminal organisation, handed down by the Austrian judges against an individual held in France for other offences. The latter refused to be handed over to the Austrian judicial authorities, on the grounds that he had not been summonsed personally to the hearing of the Vienna Court of Appeal that had issued the contested arrest warrant. He cited in particular the violation of Article 692-32 of the French Code of Criminal Procedure (hereafter referred to as "the CCP") which, for the execution of a European arrest warrant, provides for verification that the person wanted can oppose the judgment handed down in his absence.

The French investigation chamber then asked the Viennese magistrates to provide details on the enforceability of the decision to convict and on the procedural information provided to appellant. Insofar as said decision was enforceable the day it was handed down and the party concerned had been personally summonsed to the hearing, the French judges granted the deferment of surrender to the Austrian authorities. The appellant then lodged a cassation appeal, citing the fact that the French investigation chamber should have asked the Austrian authorities to provide a copy of the judgment of conviction, to attest to the enforceable nature of said conviction and to establish that he had been duly summonsed to the hearing.

According to the Cour de cassation, Article 695-32(1) of the CCP does not require the decision of conviction, on the basis of which the European arrest warrant is issued, to be final. It suffices for it to be enforceable. Consequently, the investigation chamber did not have to obtain a copy of the judgment of conviction from the authorities that issued the European arrest warrant, since Article 695-13 of the CCP makes no such requirement. The appeal was rejected.

Cour de cassation, criminal chamber, 8 February 2011, no. 11-80261, www.legifrance.gouv.fr

IA/32938-A

[MHD]

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Sitting in full court, the Conseil d'État ruled on the reasonableness of the transposal period for Council Directive 2000/78/EC establishing general framework for equal treatment in employment and occupation. The appellant, Ms Bleitrach, who suffers from a disability that restricts her mobility, has been hindered in exercising her profession as a lawyer because she could not access certain courts under the purview of the Cour d'Appel de Douai. When her action for damages against the State for having failed to transpose this directive within the prescribed period before the Cour administrative d'appel de Douai was turned down, the appellant lodged an appeal with the Conseil d'État.

The directive in question, which had to be transposed by 2 December 2003, provided for a possible derogation, extending the period by three years, i.e. until 2 December 2006, to enable the national authorities to take account of difficulties encountered in trying to bring their property assets in line – including on the judicial front – with these objectives. However, by the Act of 11 February 2005 and the Decree of 17 May 2006, the French authorities extended this transposition period to 1 January 2015.

In an action for damages from the State because of this extension of the transposition period, the Conseil d'État ruled that "in view of the extent of the judicial property assets, the large number and the diversity of buildings throughout the national territory, the specific constraints arising out of the fact that some of these buildings are old while others fall under the regulation of historical monuments, and finally, given the volume of the financial commitments required to make such buildings accessible to persons with reduced mobility, neither the maximum period of ten years set by said Act, nor the date of 1 January 2015 fixed by the decree "are […] incompatible with the objectives of the directive, which provide that reasonable arrangements have to be made."

Conversely, the Conseil d'État ruled that the State was responsible without fault for inequality concerning public offices and ordered it to pay compensation plus interest to appellant for non-pecuniary losses, and to assume the expenses incurred by her.

Conseil d'État, ass., 22 October 2010,
Ms Bleitrach, appeal no. 301572,
www.legifrance.gouv.fr

IA/32925-A

[VERDIIS]

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The judgment handed down on 1 December 2010 by the Cour de cassation, in a Franco-Malian divorce case, provides an interesting example of elements drawn from the private international law of the European Union in the reasoning based on the rules of ordinary law.

The case concerns the divorce of a couple living in Mali, where the husband is a French national and the wife holds dual French and Malian nationality. The husband obtained a divorce from the Malian courts at the exclusive fault of his wife. She lodged an appeal and left Mali with her two children, returned to France, and filed for divorce. Summoned before the French court, the husband cited lis pendens before the Malian courts. The courts ruling on the merit of the case accepted the lis pendens defence and decided to decline jurisdiction in favour of the Malian courts. The French court in fact ruled that it was not competent pursuant to Article 15 of the Civil Code, since the wife had renounced her privilege of jurisdiction by referring the matter to a Malian court first. The wife then lodged an appeal, claiming that Article 15 of the Civil Code was not applicable and that, even if it had been, her renunciation of privilege of jurisdiction had not been sufficiently shown.

The Cour de cassation rejected the appeal, on the grounds that the absence of renunciation of Article 15 was irrelevant. In reality, the question of the applicability of this provision did not arise, because in order to examine whether they were competent to hear the case at issue, the French courts should have relied on Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgment in matrimonial matters and the matters of parental

responsibility (hereafter referred to as the "Brussels II bis Regulation"), which was applicable in the case at hand regarding the direct competence of the French courts.

In this judgment, the Court actually bases its reasoning on the conditions of international lis pendens of ordinary law. As the Brussels II bis Regulation is not applicable in this case to the question proper of lis pendens – the regulation pertains only to lis pendens between the courts of different Member States – the rules of ordinary law apply. For the French courts, to which the case was referred in the second place, to decline jurisdiction in favour of foreign courts, the rules of ordinary law make it necessary to establish, in accordance with the case law of Société Miniera di Fragne (Civ. 1, 26 November 1974, no. 73-13820, Bull. Civ. I no. 312, p. 267) that the decision handed down by the foreign court is likely to be recognised in France. The conditions of exequatur arising out of the Simitch case law (Cass, civ. 1, 6 February 1985, no. 83-11241; Bull 1985, I N. 55, p. 54) require verifying whether there is a sufficient connection between the dispute and the foreign court that handed down the decision. Nevertheless – and this is where the judgment is particularly interesting – to verify this condition, the Cour de cassation uses one of the connecting factors provided in Article 3 of the Brussels II bis Regulation to reach the conclusion that the Malian court is indeed competent and that consequently the French courts must decline competence in its favour. Apart from showing that the private international law of the EU Member States is marked strongly by European law, this new approach has the advantage of bolstering the foreseeability of solutions.

Cour de cassation, 1st Civil Chamber, 1 December 2011, no. 09-70.0132, www.legifrance.gouv.fr

IA/32935-A

[MNAD]

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In a judgment of 10 November 2010 on public contracts, the Conseil d'État ruled for the first time on the nature of the conventionality review of a validation law by opting for a review in concreto.

In the case in point, the dispute concerned the validity of a contract to delegate the public service of water supply concluded by two municipalities in the South-West of France and a company specialising in water treatment and supply. After nine years during which the contract had been performed, the public authorities availed themselves of the option in the contract to terminate it. The delegate of the service initiated proceedings for compensation before the administrative court, which declared the contract null and void for lack of competence. The public authorities lodged an appeal, citing Article 6(1) of the European Convention on Human Rights (hereafter referred to as "the Convention"), and arguing that that the "State may not, without overlooking these provisions, violate the right of any person to a fair trial by taking, during the trial, legislative measures with retroactive effect which hinder the decision on this case from being contested appropriately, except when such measures are justified by an overriding general interest." In the case in point, the grounds of general interest cited had to do with the need to remove the error which affected the validity of the contracts so as to ensure the continuity of the public service.

The Conseil d'État proceeded to conduct a conventionality review in concreto to reach its decision. Taking into account the fact that the validation act came seven years after the contract had been terminated by the public authority, the Conseil d'État considered that the right to a fair trial recognised by the Convention had not been violated in regard to the cited reason to maintain he continuity of the public service, and accordingly decided that the validation act was not applicable to the dispute. The Conseil d'État therefore did not limit itself to verifying whether the validation act was justified by an overriding public interest in the abstract, but examined in concrete terms whether its application was justified in the general interest in the case in point.

Conseil d'État, 10 November 2010, no. 314449, Cne de Palavas-les-Flots et Cne de Lattes, www.legifrance.gouv.fr

IA/32936-A

[MNAD]

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In its opinion of 21 March 2011, the Conseil d'État considered that Articles 7 and 8 of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter referred to as the "Return Directive"), can be invoked directly by litigants in support of an appeal against a deportation order against them.

Consulted by the Montreuil administrative court, which had to rule on two requests to cancel deportation orders, the Council of State replied to the following question: are the provisions of Articles 7 and 8 of Directive 2008/115/EC of the European Parliament and of the Council precise and unconditional, and can they therefore be invoked directly if this directive is not transposed into French law within the stipulated period?

According to Article 7 of the Return Directive, a return decision shall provide for an appropriate period of voluntary departure (between seven and thirty days). By virtue of Article 8 of the same directive, the Return Decision may be enforced only after the period has expired.

The Return Directive was not transposed into French law before 24 December 2010, i.e. the deadline set for the Member State. The bill comprising the provisions for transposing this directive was adopted by Parliament on 11 May 2011 and was referred to the Conseil Consitutionnel on 17 May 2011. In its version currently in force, Article L 511-1, II, of the Code of Entry and Residence of Aliens and Right to Asylum (known by the French acronym CESEDA), which defines the system of deportation orders, provides no period for the voluntary departure of a foreign national before the deportation order is enforced. The question therefore arose as to whether deportation orders issued after 24 December 2010 were compatible with the Return Directive.

In its opinion, the Conseil d'État considered first that the provisions of the Return Directive did not hinder a deportation order from being issued on the basis of Article L. 511-1, II of the CESEDA, on condition that such an order complied with the substantive conditions and form provided by said directive, and that it entailed, in all the cases where required by the Directive, a minimum period of seven days before it was enforced, to give the foreign national in question time to leave voluntarily.

Relying on the criteria set by the Court of Justice, the Conseil d'État then considered that the provisions of Articles 7 and 8 of the Return Directive were sufficiently precise and unconditional to have a direct effect in French law. The Conseil d'État accordingly deduced that these articles could be invoked by litigants to support an appeal against a deportation order against them.

Finally, the Conseil d'État specified that for as long as the State has not defined in its national legislation (as required by Article 3(7) of the Return Directive), objective criteria for assessing a "risk of absconding," said risk may not be invoked to justify a reduction or elimination of the voluntary departure period pursuant to Article 7.

Conseil d'État, opinion of 21 March 2011, no. 345978 and no. 346612,
www.legifrance.gouv.fr
www.conseil-etat.fr

IA/32926-A

[CZUBIAN]

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In a case already referred to appeal in which the Cour d'Appel de Paris had contradicted the position of the Cour de cassation, a judgment was handed down on 7 January 2011 by the plenary session of the court, to put an end to the differences between the chambers of the court and to the resistance of the Cour d'Appel on the fairness in the administration of proof in competition law.

To answer this question, the court had to rule on the procedural nature of the litigation before the competition authority and found that the rules of civil procedures are applicable, unless

stipulated expressly otherwise in the commercial code. It therefore refused to accept the procedural independence of the competition authority and the punitive nature of prosecution. The direct consequence, which concerned the case at issue, was the prohibition of using unauthorised or illegal wire taps.

More specifically, according to the plenary session, unlike in criminal proceedings, where the judge may not dismiss debates, by virtue of the principle of the freedom of proof, of such means of proof produced by the parties, this principle does not apply in proceedings before the competition authorities: wire taps that constituted decisive proof of vertical agreements and had led to the condemnation of this practice are not admissible as proof, since "a telephone conversation recorded unbeknownst to the person who made the statements is an unfair procedure that makes such recordings inadmissible as proof."

Cour de cassation, plenary session, judgment of 7 January 2011
Appeals no. 09-14316 and no. 09-14667,
www.legifrance.gouv.fr
www.courdecassation.fr/IMG/pdf/Bicc_735.pdf

IA/32939-A

[ANBD]

* *Ireland*: In a judgment of 5 May 2010, the High Court complied with the appellant's request to refer a question to the Court of Justice for a preliminary ruling on the validity of Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

In this particular case, the appellant, a society formed to protect human rights within the context of modern communication technologies, argued that the defendants, including the Minister for Communication, Marine and Natural Resources and Ores and the Minister for Justice, had unlawfully exercised control over data concerning it and had thus violated in particular its right to privacy and its right to communication.

In his judgment of 5 May 2010, Justice McKechnie asked the parties to submit suggestions concerning the precise content of the questions to be asked. Nevertheless, the question for a preliminary ruling has not yet reached the Court of Justice.

High Court, judgment of 5 May 2010, Digital Rights Ireland Limited v. the Minister for Communication, Marine and Natural Resources & Ores, [2010] IEHC 221, www.courts.ie

IA/ 32660-A

[SEN]

* *Italy*: The Corte di Cassazione handed down a decision that specifies the scope of Article 31 of Legislative Decree no. 286/1998.

This decree provides that a national of a third country residing in the country illegally who is ordered to leave the country, is entitled to stay on Italian territory if his children, who normally reside with him in Italy, risk suffering mental or physical harm because of the removal of the parent.

In the case in point, a third-country national ordered to leave Italy lodged an appeal against the decision that turned down his application to remain temporarily in Italy in the interest of his children.

According to the Corte di Cassazione, the exemption provided by the aforementioned article does not concern only emergency or exceptional situations relating to the minor's state of health, but comprise any and all real, concrete, perceptible and objectively serious harm taking into consideration the minor's age or state of health, caused by the removal of a parent or by being uprooted from the place where the minor grew up.

Finally, the court specified that the children's magistrate must assess the existence of family cohesion by verifying whether the foreign national has actually exercised parental duties for the benefit of the minor and, in the case of a young minor, whether the parent is capable of looking after, of providing a suitable family environment for, and of seeing to the needs and problems of the child.

Corte di Cassazione, S.U., judgment of 25

October 2010.
No. 21799,
www.dejure.giuffre.it

IA/32840-A

[GLA]

* *Lithuania*: In its order of 24 February 2011, the *Lietuvos vyriausiasis administracinis teismas* (Supreme Administrative Court, hereafter referred to as "the LVAT") ruled on an appeal relating to excise duties on alcohol when the goods come from a third country. In this judgment, the LVAT noted, in consideration of the nineteenth recital of Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, that the exemption provided under Article 27(1)(b) of this directive applies to goods transported between Member States and does not apply to those imported from third countries.

More specifically, the case at issue concerned a request to exempt ethyl alcohol contained in French cosmetics from excise duties in Lithuania, which according to the appellant, were denatured in accordance with French requirements and exempt from excise duties in that Member State.

Nevertheless, in view of the fact that these cosmetics had been imported from Switzerland, the LVAT rejected the appeal on the grounds that because the regulations governing the exemption of goods from third countries fell under the purview of the Member States, the appellant had not provided proof that the ethyl alcohol was denatured in accordance with a method approved in Lithuania as required by Lithuanian law.

Lietuvos vyriausiasis administracinis teismas, order of 24 February 2011, no. A575-298/2011, www.lvat.lt

IA/32658-A

[LSA]

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In its judgment of 15 November 2010, the LVAT rejected the appellant's appeal against a request for recovery lodged against him pursuant to Council Directive 2008/55/EC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, aimed at verifying the enforceable nature of said request issued by another Member State.

The appellant contested in particular the fact that the German authorities (the appellant authority in this case) that had lodged the request for recovery against him, had not presented proof to the Lithuanian authorities that they had initiated appropriate recovery proceedings in their State of establishment to obtain full payment of the claim.

In this regard, the LVAT underscored that Article 7(2) of Council Directive 2008/55 stipulates that the request for recovery of a claim contains a statement from the petitioning authority to the effect that the conditions, such as the implementation of said proceedings in the Member State where the petitioning authority has its registered office, are met.

Nevertheless, the LVAT noted that neither EU law, nor national law requires the petitioning authority to prove that it has initiated such proceedings. It suffices that it declares to have done so.

Accordingly, citing Article 12(1) and 12(3) of Council Directive 2008/55, the LVAT decided that since the request for recovery of a claim and the statement had been duly made, the Lithuanian courts were not competent to verify whether the petitioning authority had initiated the proceedings in question correctly.

The LVAT considers that since the obligation to institute such proceedings is incumbent upon the institutions of the Member State where the petitioning authority has its registered office, said verification likewise falls under the competence of the courts of that Member State.

Lietuvos vyriausiasis administracinis teismas, Judgment of 15 November 2010, no. A556-15/2010, www.lvat.lt

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* *The Netherlands*: In a judgment of 9 February 2011 on a claim for compensation

because of a bitumen cartel, the Rechtbank Rotterdam ruled that there was no sufficient reason to suspend the proceedings by virtue of Article 16 of Council Regulation (EC) no. 1/2003.

The case concerned a claim for compensation lodged by the firm MNO. The latter had asked the Rechtbank Rotterdam to order Shell to pay compensation for the losses it had suffered because of the bitumen cartel. By decision of 13 September 2006, the Commission had concluded that Shell had violated Article 81 EC between 1 April 1994 and 15 April 2002.

For its part, Shell raised a procedural issue. It asked the Rechtbank Rotterdam to suspend the proceedings by virtue of Article 16 of Council Regulation no. 1/2003, since it had lodged an appeal against the Commission's decision before the court, and more particularly against the Commission's conclusion that it (Shell) was responsible for the violation and had played a leading role in the bitumen cartel.

The Rechtbank Rotterdam decided not to stay the proceedings, because certain questions raised could already be dealt with on the basis of national law. Said court argued that suspending the proceedings could prevent two different actions being taken against Shell's liability at the same time. It nonetheless concluded that MNO could run into problems about proof at a later time.

Rechtbank Rotterdam, 9 February 2011, MNO Vervat-Wegen B.V. v. Shell Nederland Verkoopmaatschappij B.V., Shell Petroleum N.V., LJN BP7518,
www.rechtspraak.nl

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[1] Judgment of 29 June 2010, TGI, C-139/07 P, not yet published.
[2] Judgment of 29 June 2010, C-28/108 P, not yet published.
3 Judgment of 12 September, "IPA", C-514/07 P, C-528/07 P and C-532/07 P, not yet published.
[4] M. Lavedan, "Nouveau recul de la transparence dans le cadre de l'accès aux documents", *Revue Lamy de la Concurrence,* January-March 2001, p. 85.
[5] G. Muguet-Poullennec, "Vers la fin de la transparence dans les procédures administratives?" *Revue Lamy de la Concurrence,* October-December 2010, pp. 51-55.
[6] L. Idot, "Le règlement no. 1049/2001 doit-il s'appliquer aux 'procédures concurrence'?", *Europe,* October 2010; p. 5.
7 Ibid., p. 10.
[8] M. Aubert, E. Broussy, and F. Donnat, Chronique "Aide d'État – Accès au dossier d'enquête," *AJDA,* 6 September 2010, pp. 1585-1586.
[9] G. Muguet-Pullenec, op. cit, pp. 54-55.
[10] Judgment of 1 July 2008, C-39/05 P and C-50/05 P, ECR P. I-4723.
[11] G. Muguet-Poullennec, op. cit., pp. 54-55.
[12] Judgment of 10 December 2010, T-494/08 to T-500/08 and T-508/08, not yet published.
[13] Judgment of 24 May 2011, T-109/05 and T444/05, not yet published.
[14] L. Idot, op. cit., p. 6.
[15] Judgment of 9 June 2010, T-237/05, not yet published.
[16] Judgment of 7 July 2010, T-11/07, not yet published.
[17] L. Idot, op. cit., p. 5.
[18] G. Muguet-Poullennec, op. cit. p. 53.
[19] L., Idot, op. cit., p. 10.
[20] Ibid.
[21] Ibid.
[22] G. Muguet-Poullennec, op. cit., p. 55.
[23] L. Idot., op. cit., p. 10.
[24] Case 2953/2008/FOR, Cf. Annual Report of the European Ombudsman 2010, p. 39.
[25] G. Goddin, "Recent judgments regarding transparency and access to documents in the field of competition law: Where does the Court of Justice of the EU strike the balance?, *Journal of European Competition Law and Practice*, 2011, pp. 10-20.
[26] F. Kauff-Gazin, "Transparence – Accès à des données personnelles et respect de la confidentialité et la vie privée," *Europe,* October 2010, pp. 12-13.
[27] G. Muguet-Poullennec, "Transparence et protection des données à caractère personnel," *Revue Lamy de la Concurrence,* October-December 2010, p. 75.
[28] Tribunal judgment of 8 November 2007, T-194/904, ECR p. II-4523.
[29] F. Kauff-Gazin, op. cit., p. 13.
[30] Ibid.
[31] G. Goddin, op. cit. p. 21.
[32] G. Muguet-Poullennec, "Transparence et protection des données à caractère personnel," cit supra, p. 75.
[33] F. Kauff-Gazin, op. cit., p. 13.
[34] Ibid.
[35] M. Lavedan, op. cit., p. 85-86

[36] B. Kilpatrick and L. Holden, "Transparency clarified: API v Commission," *Journal of European Competition Law and Practice,* 2011, p. 40.
[37] T. Bombois, "*Arrêt 'API: Droit d'accès aux memoires de la Commission et protection des procéures juridictionnelles,"* JDE, 2011, p. 7.
[38] J. Dupont-Lassalle, "Accès aux documents de la Commission," *Europe,* November 2010, p. 16.
[39] T. Bombois, op. cit., p. 9.
[40] M. Lavedan, op. cit., p. 86.
[41] T. Bombois, op. cit., p. 9.
[42] Ibid., p. 7 and 9.
[43] Cf. note 10.
[44] T. Bombois, p. 10-11.
[45] G. Muguet-Poullennec, "Vers la fin de la transparence dans les procedures administratives?" op. cit., p. 51.
[46] Judgment of 9 September 2008, T-403/05, ECR p. II-2027.
[47] Cf. note 15.
[48] Cf. note 16.
[49] G. Goddin, op. cit., pp. 22-23.